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(18,606.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1903.

No. 86.

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THE ROYAL INSURANCE COMPANY, PLAINTIFF IN ERROR,

*vs.*

RUPERTO MARTIN, AS EXECUTOR OF THE WILL OF FRANCISCO MARTIN, DECEASED.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

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1 In the District Court of the United States for Porto Rico.

At a stated term of the district court of the United States of America, within and for the district of Porto Rico, begun and held at the court rooms in the city of Ponce, on the second Monday of May, being the twelfth day of that month, in the year of our Lord one thousand nine hundred and two and of the Independence of the United States of America the one hundred and twenty sixth.

Present: The Honorable Wm. H. Holt, judge.

Among the proceedings had were the following, to wit:

| | |
|---|---|
| GUADELUPE VASQUEZ, Widow of Francisco Martin; Ruperto Martin, Heir and Executor of *of* the Will of Francisco Martin, and Encarnacion, Artoro, Ines, Juan, and Francisca Martin, the Latter a Minor, Who Sues by Guadelupe Vasquez, Her Next Friend, Heirs of Francisco Martin, Deceased,<br>*against*<br>THE ROYAL INSURANCE COMPANY, a Corporation. | C L. # 110. Assumpsit. Damages, ($20,000.00). |

Be it remembered that heretofore, to wit, on the 21st day of February, 1902, came the plaintiffs by their attorney and filed in the clerk's office of this court a declaration in this cause, which declaration is clothed in the words and figures following, to wit:

*Declaration.*

2 In the United States District Court for Porto Rico.

GUADELUPE VASQUEZ, Widow of Francisco Martin; RUPERTO Martin, Heir and Executor of the Will of Francisco Martin, and Encarnacion, Arturo, Ines, Juan, and Francisca Martin, the Latter a Minor, Who Sues by Guadelupe Vasquez, Her Next Friend, Heirs of Francisco Martin, Deceased,
*against*
THE ROYAL INSURANCE COMPANY, a Corporation.

Assumpsit. Damages, twenty thousand dollars.

Guadelupe Vasquez, widow of the late Francisco Martin, Ruperto Martin, heir and executor of the will of Francisco Martin, and Encarnacion, Arturo, Ines, Juan and Francisca Martin, the latter a minor who sues by her next friend Guadelupe Vasquez, all heirs of the late Francisco Martin, citizen- of Porto Rico and resident- of Ponce, by their *their* attorney Charles M. Boerman, complain of The Royal Insurance Company, a c-rporation organised under the laws England and having an office and doing business in the island of Porto Rico, within this judicial district, defendant, of a plea of

trespass on the case on premises. For that whereas the defendant on or about the first of January 1898 made and renewed its policy of insurance and delivered the same to the late Francisco Martin above mentioned, and thereby then and there, in consideration of a certain amount of pounds sterling, equivalent then to the sum of $378.40 to it paid by said Francisco Martin did insure him against loss or damage by fire to the amount of sixteen hundred pounds sterling English money, equivalent to eight thousand dollars, on the building situated at Coto Laurel, district of Ponce, Porto Rico, built of wood and covered with metal and also the goods, chattels and merchandise and provisions in said building kept and contained and the defendant for the consideration aforesaid did by the said policy promise and agree to make good and satisfy unto the said
3 Francisco Martin, his executors, administrators, heirs and assigns all such loss or damage not exceeding the said sum of eight thousand dollars as should happen by fire to the said property whereon the said insurance was so made as aforesaid, such loss or damage to be estimated according to the true and actual value of the said property at the time such loss or damage should happen, all however according to the conditions attached to and *had* made a part of said policy of insurance, expressed in the Spanish language, a copy of which conditions together with their true translation into the English language hereafter follow, to wit.

## Translation into English.

### *Conditions of This Policy.*

1. Any bad description of any part of the property *by* which is to be insured, or of any building where the said property is deposited or the negligence to notify the existence of some dangerous trade, or of some apparatus to produce heat, or the negligence to acknowledge the existence of any material circumstance which necessarily must be taken into consideration to appreciate the danger, at the time of the insurance or after, will annul this policy which covers the property so affected by bad description or negligence.

2. If after the danger has been considered by the company, something *something* was done to the said property or building where the said property is deposited, augmenting the danger, or if the said property is removed to another building, or if for any cause the danger is augmented, without the authorization of the company, or if the *or if the* holder refuses or neglects to pay those additional premiums required on account of the augment of danger, this policy becomes null, and if on account of such an alteration or addition, or any cause, the company or its agents wish to end the insurance, said company or agents will have right to do so, by simply notifying the holder or his representatives, and will also have right to
4 require the devolution of said policy for its cancellation, providing that in such a case, the company will have to return to the holder the amount of the premium paid and also the amount

corresponding in legal proportion to the time lacking for the expiration of the policy.

This policy does not cover properties in deposit or in commission if they are not plainly described as such, and also not porcelain, crystals, mirrors, precious stones, clocks or watches, things of great value, medals, cloths, manuscripts, engravings, paintings, designs, sculptures, musical, mathematical and scientific instruments samples, models and moulds, if they are not plainly described in the policy, also not bonds or contracts, obligations, bills of exchange, promissory notes, stamps, commercial books, powder and loss or loss or damages caused by fire occur-ed during an invasion or presence of enemies, rebellion, insurrection, riot or disturbance, military government, martial law, if it is not proved to -he satisfaction of the company that said fire was not caused by and did not have any relation with the said invasion, rebellion, military government or martial law. This policy does not cover the loss or damages caused by volcanoes, earthquakes, hurricanes or other eruptions, convulsions or its results, also not those caused by the burning of forests, woods, plains, etc., and those caused bt fermentation, or by the spontaneous heating of the insured object, or the goods or merchandise destroyed or spoiled while under a treatment requiring the application of heat through the fire, also not loss or damages caused by explosion except those caused in a building and its properties by the explosion of gas in the same building, providing that the gas is not manufactured in the building. If a building or a part of it falls down, the fall not being caused by fire, any insurance made with this company on the said building or its contents, will thereby end.

4. No insurance proposed to the company will be considered in force and vigor until the premium is paid. No receipt of premiums will be *worth* if it is not one of those printed and issued by the office of the company and signed by one of its employees or agents and all conditions or preventions contained or endorsed in those receipts will be considered a part of this policy.

5. This policy is not in vigor if any of the properties insured in its pass to another person by any title not proceeding from testamentary dispositions, or from the operation of laws, if the *if the* company is not informed and the insurance in favor of the new owner is not declared by a note endorsed to this policy by the company or its representative.

6. If any property insured in the present policy is lost by fire the holder will notify the company or its agents and in no more than fifteen days give them a relation as plain as possibly he can make of the property and the articles or ogjects spoiled or destroyed by the fire and also other articles and things (if any) issued in this policy, stating the value of everything respectively, taking into consideration its value at the time of the fire and the legal amount of the loss or damages caused by the fire to the said articles and property, taking into consideration the state, condition and value of the same at the start of the fire and also the interests that the holder had in them, and in order to enforce that relation or representation

the holder will present all proffs and explanations and all other reasonable evidence required by the company or its representative and also, if required, a declaration in legal form, as to the truth of his relation and in case of non-fulfillment of these conditions or any of them no claim based on the said loss or damages will be valid and payable, until the said notice, relation account, explanations and evidence are made and presented and until the declaration in legal form is given if required. The insured objects damaged or not, cannot be allowed to the company.

6 7. In the claims for loss and damages no profit of any kind shall be included, and if the claim has in any part of it a fraudulent character or if a false declaration was given in legal form to enforce said claims, or if the fire is caused by the holder or on his instigation or knowledge or consent, he will lose all benefice that he may receive from this policy.

8. In the loss or damages occurred by moving the insured objects in order to save them from the effects of the conflagration, this company will only contribute so that the amount insured in the present policy has the total value of the property before the removal, but the company is not responsible for the part of the property, object or article stolen and also not for the expenses made by the holder or others without to obtain before the permission of the company or the agents.

9. The company will have ri-ht, if convenient to place or to restore the property spoiled or destroyed, or any part of the said property, instead of paying cash the amount of the loss or damages, or will have right to agree unami-ously with another insurance company to do so, and that restitution will be considered sufficient, if it is firmly executed, even if the property is not restored to its former appearance and conditions.

10. In case of loss or damages caused by fire in any building, or property or effects existing in the said building, where a claim can be made to the holder of this policy the company, free in this case of all charges for offences or insults will have right by itsself, or by its employees or authorized agents etc., etc., to enter in possession for a reasonable time of all buildings, properties or effects, for any reasonable object in relation with this insurance, and this policy is a testamony, permit, license for authorization to that effect.

7 11. The holder will have to notify the company if any insurance or insurances have been made somewhere else on the properties insured hereby, or any part of them, and those details have to be endorsed in this policy, and if the said notification and the corresponding endorsement are not made, the holder will not have right to any benefit, according to this policy.

12. If at the time of any loss or damages caused by fire to any properties hereby insured, there are other insurances covering the same property if they have been done by this holder or any other person this company will not have to pay, in contribution to said loss or damages, more than the amount corresponding to it in legal proportion.

13. If in any case there are other insurances, made by this holder or any other person or any property covered by this policy, exclusively or with any other property comprehended in the same danger or risk and subject to it only and if a proportional division must be made between those insurances, the one covered by this policy will also be included in the said distribution or division.

14. If there was in any time disagreement between the company and the holder or any other person making any reclamation based on this policy about the amount that has to be paid for any loss or damages caused by fire, all those disagreements, when and where they occur, have to be submitted to the decision of a person not interested in the matter elected by the party making the reclamation and by the company (except where the company, suspecting a fraud claims not to be responsible, or where the above mentioned conditions or a part of them have not been carried out, or when the person making the reclamation has in any manner lost all rights, according to this policy. In case of disagreement in the decision, two persons not interested in the matter have to be elected, one by the party making the reclamation, and the other by the company or its agent, manager or vice manager it being understood that if any of the
8 parties refuses or neglects to elect an arbitrator in ninety days after receiving order to make the election and after having presented all proffs, evidence and explanations as agreed in the antecedent condition No. 6, the other party is authorized to elect both arbitrators and in case of a disagreement between those arbitrators as to the amount payable, said disagreement must be submitted to the decision of a third person elected by the two arbitrators before the consultation of the matter, and in case of death of one of the arbitrators or the third one, another one will be elected by one of the parties or by the arbitrators (it depends on who elected before the dead arbitrator) and the decision of the arbitrators will be the decisive evidence as to the amount that has to be paid for the said loss or damages. Both parties will pay their consultation fees and half of the cost of the decision (including fees for arbitrators). An indispensible condition to the value of this policy and an essential part of the contract between the company and the holder, is that unless the company suspecting fraud, or all conditions not being *not* fullfilled, or in case of loss of benefits in the above mentioned houses, claims not to be responsible, the holder or the person making the reclamation will not have right to start a suit or begin any proceedings in the courts of justice in virtue of this policy, until the amount of the loss or damages has been consulted and determined, and then the amount fixed in virtue of the decision must be a condition to start any judicial action and will also be taken into consideration by the company for the obligation that it has to pay the reclamations that could take place in virtue of this policy. If the holder does not make any reclamations within three months after the fire, he will then lose all rights that may correspond — him according to this policy.

15. If on account of the above mentioned conditions this policy becomes null, all amounts paid for the policy, are lost in favor of the company.

16. The managers cannot be sued, nor can they be made responsible personally for this insurance, and the agents will never be responsible for any investigation made in legal form or of another character which they find necessary to make for the satisfaction of the company and their personal funds or means cannot be judically seized for any lost alleged by the holder.

17. The company is not responsible for damages caused by lightning if those damages are not caused by the burning of the building or the consequences of the lightning.

18. If the company cannot repair or restore the buildings, when so required by the laws for -he regulation of streets and for the building of houses, the company will only be compelled to pay the necessary amount for the reparation of the said buildings, if the said reparation is possible.

19. It is hereby agreed that if the property covered by this polidy had at the time of the fire more value than the insured amount then this company will only pay for loss and damages the proportion between the insured amount and the total value of the property at the time of the fire." * * *

And the plaintiffs further aver that at the making of the said policy and from thence until the happening of the loss and damage hereinafter mentioned the said Francisco Martin had an interest in the said property to the amount of said sum by the defendant insured thereon as aforesaid. And the plaintiffs further aver that on or about the twentieth of August 1898 and while the term of said policy had not yet expired and said policy still was in full force and vigor and effect and all its particulars the said property was consumed and destroyed by fire, whereby the said Francisco Martin and thereafter his legal representatives the plaintiffs then and there sustained loss and damage on the said property to the amount of the sum last aforesaid that is to say the sum insured and also consequent-al damages by and through the refusal of the defendant to pay said amount which said loss and damage did not happen by means of an invasion, insurrection, riot or civil commotion, or of any military or usurped power and the plaintiffs further aver that right after the fire and loss the defendant refused to consider the claim and the plaintiffs further aver that there was not at or since the time of the making of the said policy or the continuance of said insurance as aforesaid any other insurance on said property, and that the said building was *was* not at or since that time appropriated, applied or used to or for the purpose of carrying on or exercising therein any trade business or occupation denominated hazardous or extra-hazardous, or included in any special rates except as specially provided for by the said contract of insurance.

Nevertheless, although -he plaintiffs and the said Francisco Martin, deceased, have kept and performed all things in the said

policy mentioned on his part to be kept and performed, the defendant has not even considered the claim of the plaintiffs but has refused to pay anything whatsoever on account of said loss under said policy has not yet paid the plaintiffs, neither the said Francisco Martin, the deceased, aforesaid amount of the loss and damage sustained or any part thereof, but refuses to do so. And the plaintiffs further aver that the said Francisco Martin has since departed his life, to wit on or about the 25th of October 1900, and that the plaintiffs are his only heirs and Ruperto Martin, one of the plaintiffs, the executor of his last will and testament, and this plaintiff brings into court said last will and testament whereby it fully appears that he is the executor of the said last will and testament of the said Francisco Martin, deceased, and has the execution thereof. Wherefore the plaintiff brings this suit for the sum of twenty thousand dollars and their costs.

(Sig.) (C. M. BOERMAN),
*Attorney for the Plaintiffs.*

11 U. S. OF AMERICA,
*District of Porto Rico,* } *ss:*

Ruperto Martin one of the plaintiffs in the above entitled action on oath says that he has heard read the foregoing declaration, that all the allegations therein contained are true to his own knowledge, except as to those stated upon information and belief and as to those he believes it to be true.

(Sig.) (RUPERTO MARTIN.)

Sworn to before me this 21st. day of February, 1902.

(Sig.) (RICARDO NADAL),
*Clerk U. S. District Court of Porto Rico,*

(Sig.) By (A. AGUAYO),
*Deputy Clerk.*

And afterwards, to wit, on the same day came the plaintiff by his attorney and filed in the clerk's office of the court aforesaid his certain præcipe in the said case, which *siad* præcipe is clothed in words and figures following, to wit:

*Præcipe for Summons.*

In the United States District Court *fo* Porto Rico.

GUADALUPE VAZQUEZ MARTIN ET AL.
*against*
THE ROYAL INSURANCE COMPANY.

Action on assumpsit. Damages, twenty thousand dollars.

The clerk will please issue a summo-s in the above named defendant The Royal Insurance Company and returnable on the second Monday in May at the coming May term of this court.

C. M. BOERMAN,
*Plaintiffs' Attorney.*

12 And thereupon, on the same day there was issued out of the clerk's office of the court aforesaid our certain writ of summons in this case directed to the marshal of this district and against the said defendant, which said summons is clothed in the words and figures following, to wit:

*Summons.*

In the District Court of the United States for Porto Rico.

GUADALUPE VAZQUEZ, Widow of Francisco Martin; Ruperto Martin, Heir and Executor of the Will of Francisco Martin, and Enca-nacion, Arturo, Ines, Juan, and Francisca Martin, the Latter a Minor, Who Sues by Guadalupe Vazquez, Her Next Friend, Heirs of Francisco Martin, Deceased,

vs.

THE ROYAL INSURANCE COMPANY, a Corporation.

#110. Assumpsit. Damages, $20,000.

UNITED STATES OF AMERICA, *District of Porto Rico*, } ss:

The President of the United States of America to the marshal of the district of Porto Rico, Greeting:

13 You are hereby commanded to summon the Royal Insurance Company, a corporation if they can be found in your district, to be and appear before the United States district court for the district of Porto Rico at the court-rooms of said court in the city of Ponce, P. R., on the twelfth day of May 1902, then and — to answer unto Guadelupe Vasquez widow of Francisco Martin, Ruperto Martin heir and executor of the will of Francisco Martin and Encarnacion, Artoro, Ines, Juan and Francisca Martin, the latter a minor who sues by Guadelupe Vasquez her next friend heirs of Francisco Martin, deceased, on an action in assumpsit damages, twenty thousand dollars, and have you then and there this writ.

Failing to so appewr judgment may be entered against the said defendant by default.

Witness, the Honorable Wm. H. Holt, judge of the district court of the United States for Porto Rico, this 21st. day of February A. D. 1902, and of the Independence of the United States of America the 126.

Attest:

RICARDO NADAL, *Clerk*,
By A. AGUAYO, *Deputy*.

And afterwards, to wit on the first day of March of the year aforesaid, came the marshall of said district to whom the said writ was in form aforesaid directed and returned the same into the clerk's office

of the court aforesaid, with his proceedings endorsed thereon clothed in the words and figures following, to wit:

*Marshal's Return.*

Return on service of writ.

UNITED STATES OF AMERICA:

In the District Court of Porto *Rico.*

14 I hereby certify and return that I served the annexed summons on the therein-named "The Royal Insurance Company" by handing to and leaving a true and correct copy thereof with N. Arsuaga a member of the firm of Sobrinos de Esguiaga and chief agents within my district of said company The Royal Insurance Company, personally at San Juan, P. R. in the said district on the 24th. day of February, A. D. 1902.

E. S. WILSON,
*U. S. Marshal,*
By J. L. MILLER, *Deputy.*

And afterwards, to wit, on the 17th. day of March, in the year last aforesaid, came one — the plaintiffs in this case by his attorney, and filed in the clerk's office of the court aforesaid his petition for appointment of a guardian *ad litem* which said petition is clothed in the following words and figures, to wit:

In the United States District Court for Porto Rico.

GUADELUPE VASQUEZ ET AL.
*against*
THE ROYAL INSURANCE CO.

UNITED STATES OF AMERICA,
*District of Porto Rico,* } ss:

Ruperto Martin on oath says that he is one of the plaintiffs in the above entitled action. That it is an action on assumpsit for money due on an insurance policy. That one of the plaintiffs to wit Francisca Martin, the sister of the affiant, is a minor.

Wherefore he prays that a guardian *ad litem* be named and appointed by the court for said minor.

(Sig.) RUPERTO MARTIN.

Sworn before me this 14th. day of March 1902.
(Sig.) (A. AGUAYO.)

15 And afterwards, to wit, on the same day of the year last aforesaid an entry was made upon the order book of said

court in said cause which said entry is clothed in the words and figures following, to wit:

In the District Court of the United States for Porto Rico.

GUADELUPE VASQUEZ ET AL.
*vs.*
THE ROYAL INSURANCE COMPANY.

*Order.*

Upon the affidavit of Roberto Martin, verified on March 14th, 1902, and filed in this court.

It is hereby ordered that said Roberto Martin be and he is hereby appointed guardian *ad litem* for Francisca Martin, a minor.

March 17th, 1902.

(Sig.) (WM. H. HOLT), *Judge.*

And afterwards, to wit, on the 12th, day of May, of the year last aforesaid, an entry was made upon the journal of said court in said cause which said entry is clothed in the words and figures following, to wit:"

*Entry.*

Now come Dexter and Cornwall and enter their appearance as counsel for the defendant therein.

And afterwards to wit, on the same day of the year last aforesaid came the defendant in this case by its attorn-ys and filed in the clerk's office of the court aforesaid their certain demurrer in this case, which said demurrer is clothed in the words and figures following to wit:

In the District Court of the United States for Porto Rico, Sitting in Ponce.

GUADELUPE VASQUEZ MARTIN ET AL.
*vs.*
THE ROYAL INSURANCE COMPANY.

*Demurrer.*

16 Now comes defendant and demurs to the declaration of plaintif- herein filed and says that it is not sufficient in law for the reason that it does not state the cause of action and because upon its face there is an improper misjoinder of parties and because of want of a capacity of plaintiffs to sue in the manner and form alleged.

Wherefore *plaintiff* prays whether it should further plead herein and asks to be dismissed with costs herein expended.

(Sig.) (F. H. DEXTER,)
HORTON AND CORNWALL,
*Attorneys for Defendant.*

And afterwards to wit, on the same day and the year last aforesaid an entry was made upon the journal of said court in the said cause which said entry is clothed in the following words and figures to wit:

*Entry.*

Now comes C. M. Boerman Esq. attorney for the plaintiff in the case of Guadelupe Vasquez Martin *et al. vs.* The Royal Insurance Co. and presents a motion to strike certain grounds of the demurrer filed herein, and after hearing arguments on demurrer F. H. Dexter appearing for the defendant the case is submitted on the demurrer.

And afterwards on the 14th, day of May of the year last aforesaid came the plaintiffs herein by their attorneys and filed in court *his* certain joinder and demurer in this case which reads in words and figures following, to wit:

*Joinder on Demurrer.*

United States District Court of Porto Rico.

GUADELUPE VASQUEZ MARTIN ET AL.
*vs.*
THE ROYAL INSURANCE COMPANY.

17 And the plaintiff says that said declaration and matters therein set forth are in manner and form sufficient in law for him to have, and ascertain by action that he is ready to verify and prove the same therefore, inasmuch as the defendant has not answered nor denied the same he prays judgment.

(Sig.) C. M. BOERMAN,
*Plaintiff's Attorney.*

And afterwards, to wit, on the same day and the same year last aforesaid, the following opinion and order was made by the court and entered and filed, which said order as entered in the journal of the court is clothed in the words and figures following, to wit:

*Opinion.*

This cause is submitted upon a demurrer to the declaration. It is urged that there is a misjoinder of party plaintiffs. If this be apparent upon the face of the declaration it may be reached by demurrer. The action is upon a policy of insurance. Both the executor and the heirs of the insured are joined as plaintiffs.

From the averments of the declaration the loss occurred during the lifetime of the testator.

Under the Civil Code of Porto Rico, section 902, the powers of an executor are limited, and he does not seem to have the right to sue upon claims due the testator, but it expressly provides that the executor's powers are thus limited if the testator has not provided as

to them. In this instance it appears from one clause of the will that all debts due the testator are to be collected and in another clause the executor is given full and ample power to carry out the provisions of the will. If it be true that otherwise he would not have the power to sue for this claim, yet clearly by the will he has the power to do so and the widow and heirs are not proper and necessary parties. It is also urged that assumpsit does not lie
18 upon a policy of insurance under corporate seal; that covenant is the remedy. Undoubtedly this was the well settled rule as to an action upon a specialty. It has been variously modified and the action of assumpsit has grown in importance and use; but an examination of the declaration clearly obviates this objection and it is not well taken. Upon the ground, however, of a misjoinder of parties the demurrer is sustained. Leave is given plaintiff to amend and he thereupon did so.

(Sig.) WM. H. HOLT, *Judge.*

And thereupon to wit, on the same day and year last aforesaid the plaintiff by his attorney filed in court the following.

*Amendment of Declaration.*

The declaration is hereby amanded as follows, to wit;

In the title of the case strike — all names of plaintiffs, and read as follows: "Ruperto Martin, executor of the will of Francisco Martin against The Royal Insurance Company of Liverpool, a corporation."

In the beginning of the declaration strike out all words on the first six lines from Guadelupe to "Ponce," and insert instead: "Ruperto Martin, executor of the last will of Francisco Martin, deceased, a citizen and resident of Porto Rico."

On the last page, line 16, strike — the words from "and that" to "testament," on line 18, and insert instead "and that the plaintiff is the executor of his last will and testament."

(Sig.) (C. M. BOERMAN,)
*Attorney for Plaintiffs.*

U. S. OF AMERICA,
*District of Porto Rico.*

C. M. Boerman being duly sworn says upon information and belief that the foregoing amendment is true in fact and substance.

(Sig.) (C. M. BOERMAN.)

Sworn before me this 14th, day of May 1902.

(Sig.) A. AGUAYO, *D. C.*

19 And afterwards to wit, on the 15th, day of May of the same year last aforesaid an entry was made upon the journal of said court in said cause which said entry is clothed in words and figures following, to wit:

*Entry.*

Set for May 17th, 1902.

And afterwards to wit, on the 15th, day of May of the year last aforesaid came the defendant in this case by his attorney and filed in the clerk's office of the court aforesaid his certain plea in this case which said plea is clothed in words and figures following, to wit:

*Plea.*

Now comes the defendant, The Royal Insurance Company above named, by its attorneys, F. H. Dexter, and Horton and Cornwall, and for plea to the declaration of *of* plaintiff says that it never promised in manner and form as in the said declaration alleged, and of this it puts itself upon the country.

2. For a second and further plea defendant says that plaintiff ought not to have his aforesaid action for the reazon that plaintiff and the said Francisco Martin released and discharged defendant of all liability by reason of all matters and things alleged in said declaration, and this defendant is ready to verify.

3. For a third and further plea to the declaration of plaintiff, defendant says that he should not have and maintain his said action because after the risk set forth in said declaration has been undertaken the stock and merchandise insured was removed from the building or place in which it was described in the policy of insurance as being described and contained, without the consent or sanction of defendant signified by endorsement on said policy.

4. For a fourth and further plea defendant says that plaintiff ought not to have his said action because the alleged loss or damage was caused by fire happening during the existence of an invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military and usurped power, and martial law, within Porto Rico and in the locality in which the property alleged to have been insured was situated, and that no proff was made to the satisfaction of thr directors that such loss or damage as alleged was not occasioned by or connected with, but occurred from a cause or causes independent of the existence of such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law.

5. For a fifth and further plea defendant says that plaintiff ought not have or recover said action for the reason that within the period of fifteen days there was not delivered to defendant by plaintiff or the said Francisco Martin, or any one for him, a particular account as reasonably practicable of the several articles or matters alleged to have been damaged or destroyed by fire and also of all other articles or matters alleged to have been insured by the said policy, the estimated value of each of them respectively, having regard to their several values at the time of the fire; nor did the said Francisco Martin,

nor any one for him, nor plaintiff, give in support thereof all such vouchers, proofs and explanations and other evidence as required by the defendant, together with the statutory declaration of the truth of the account.

6. For a sixth and further plea, defendant says that plaintiff ought not to have or recover herein for the reason that the house insured passed by mortgage and transfere to another person, otherwise then by will or operation of law, without notice thereof being given to defendant.

7. For a seventh and further plea defendant says that plaintiff ought not to have or recover herein for the reason that plaintiff has no interest in or right to recover because of the transfer and mortgage of said premises, and the foreclosure thereof.

21 Defendant says that all of the said matters and facts set forth in the pleas 3, 4, 5 and 6 are material conditions in the said policies of insurance by reason thereof plaintiff cannot recover, and as to the said 3rd., 4th, 5th, 6th, and 7th, pleas defendant says that he is ready to verify.

(Sig.) (F. H. DEXTER,)
HUNTER & CORNWALL,
*Attorneys for Defendant.*

Otto Wantzelin., being duly sworn, upon oath says that the matters and things stated in the foregoing pleas are true in point of fact. This affidavit is made by him as agent of defendant company.

(Sig.) (FELICI & CO.,)
By order OTTO WANTZELIN.

Subscribed and sworn to before me this 15th, day of May, 1902.

(Sig.) RICARDO NADAL, *Clerk*,
By H. H. SCOVILLE, *D. C.*

And afterwards to wit, on the 17th, day of May of the year last aforesaid, came the defendant by his attorney and filed in the clerk's office of -he court aforesaid his certain replication, which is clothed in the words and figures following: to wit:

*Replication.*

And the plaintiff as to the plea of the defendant first by him above pleaded, and thereof he has put himself upon the country, does the like.

And as to the second plea of the defendant the plaintiff says that by reason of anything in that plea alleged he ought not to be barred from having his aforesaid action because he says that he has never released and discharged the defendant as therein alleged, and because that -he supposed writing of release is not his deed, and he further says upon information and belief that Francisco Martin, deceased, has never released and discharged the defendant as therein

alleged, and that the supposed writing of relief is not the deed of said Francisco Martin, which he is ready to verify.

22 And as to the third, fourth, sixth and seventh pleas of the defendant above pleaded and whereof he puts himself upon the country, the plaintiff does the like.

And as to the fifth plea of the defendant above pleaded the plaintiff says that he ought not to be barred from bringing his suit by reason of anything therein alleged because he says that the defendant after due notice of the destruction of the premises insured by said policy by the fire has absolutely and under any and all circumstances refused to pay any of the amount insured or any part thereof on the ground as the defendant alleged that the fire occurred by reason of the invasion and revolution, and therefore the plaintiff was not bound to produce any of the particular accounts in the said plea mentioned and the defendant has never asked for such particular account, and to this he is ready to verify.

(Sig.) C. M. BOERMAN,
*Plaintiff's Attorney.*

Personally came Ruperto Martin who being duly sworn, upon oath says that the statement of facts contained in the above and foregoing replication are true.

(Sig.) RUPERTO MARTIN.

Sworn to and subscribed before me this 17th, day of May 1902.

(Sig.) A. AGUAYO, *D. C.*

23 And afterwards, to wit, on the same day and the same year last aforesaid, came the defendant in this case by its attorney and filed in the clerk's office in the court aforesaid his certain motion to strike out part of replication which said motion is clothe- in the words and figures following, to wit:

*Motion to Strike Out Parts of Replication.*

Now comes defendant by leave of the court and moves the court to strike out of the second paragraph of plaintiff's replication all that part after the words "as therein alleged" for the reason *for the reason* that such part of said paragraph and replication is not responsive, is surplusage and is not material or relevant to the plea to which it purports to reply.

And defendant moves to strike out all of paragraph four, which purports to be a reply to the fifth plea of defendant for the reason that said attempted replication is argumentative, is not a good matter of reply, and is not responsive or proper matter of replication.

(Sig.) DEXTER, HORTON, CORNWALL,
*Attorneys for Royal Insurance Company.*

And thereupon, to wit, on the same day and the same year last aforesaid an entry was made upon the journal of said court in said cause, which said entry is clothed in the words and figures, to wit:

*Entry.*

Now upon motion of the defendant the court orders that so much of the second paragraph of the replication as referrs to a release in writing and no more should be stricken out.

The motion to strike out paragraph four of the replication is overruled.

By consent of counsel in open court issue is joined on this case on replication.

24 And afterwards to wit, on the same day and the year last aforesaid, an entry was made upon the said journal of said court which entry is clothed in words and figures following, to wit:

*Entry.*

This cause coming on regularly for trial both sides answer ready. Thereupon the marshal is directed to summon from among the bystanders six good sober upright men to appear nine-thirty a. m. May 19th, 1902, to serve as jurors in this case.

And afterwards to wit, on the 19th day of May of the year last aforesaid, an entry was made upon the journal of said court, in said cause which said entry is clothed in words and figures following, to wit:

*Entry.*

Resumed.

Now comes the United States marshal in pursuance of an order heretofore entered herein and places in the jury box the following names of persons vis: W. S. Lee, C. Channel, T. E. Lee, Carlos Cabrera, E. A. Homouth and W. T. Bennet who duly qualified as jurors.

The jury as elected and sworn to try the case was composed of the following named persons to wit: W. H. Evans, F. Z. Basora, Rafeal Santoni, George Higgs, Artoro Salas, Santiago Oppenheimer, M. Monsanto, W. S. Lee, C. Channel, T. E. Lee, Carlos Cabrera, E. A. Homouth who hears all the evidence in the case and argument of counsel for the plaintiff.

And afterwards to wit, on the 20th, day of May of the year last aforesaid an entry was made upon the journal of said court in said cause which said entry is clothed in the words and figures following, to wit:

*Entry.*

Resumed.
The jury hears argument of counsel for defendant, charge of court and retires.

And afterwards to wit, on the same day and the same year last aforesaid, an entry was made upon the journal of said court, in said cause which entry is clothed in the words and figures following, to wit:

25 *Entry.*

Now comes the jury herein and returns into court the following verdict to wit:

"We the jury find for the plaintiff in damages the sum of seven thousand six hundred and twenty-three dollars ($7623).
FRANCISCO B. BASORA, *Foreman.*

And afterwards to wit, on the same day and the same year last aforesaid, an entry was made upon the journal of said court which said entry is clothed in words and figures followin-, to wit:

*Entry.*

Upon application of the defendant herein the bond for the purposes of writ — error is fixed at *tewlve* thousand dollars.

And afterwards to wit, on the 21st, day of May of the year last aforesaid, an entry was made on the journal of said court in said cause which said entry is clothed in words and figures following, to wit:

*Entry.*

This cause having come to trial on May 20th, 1902, and the jury having rendered the verdict in frvor of the plaintiff and against the defendant for the sum of $7623 in damages.
It is now adjudged by the court that the plaintiff in the above entitled cause to wit, Ruperto Martin, executor of the will of Francisco Martin, recover of the defendant, The Royal Insurancr Company of Liverpool the sum of seven thousand six hundred and twenty-three dollars, with interest at twelve per cent. per annum, until paid and his costs herein to be taxed by the clerk of this court and for which plaintiff may have execution.

And afterwards to wit, on the 22nd, of May of the year -ast aforesaid came the plaintiff by its attorney and filed in the clerk's office of the court aforesaid, his certain motion for a new trial, which motion is clothed in words and figures following, to wit:

*Motion for New Trial.*

Now comes the defendant and moves the court to set aside the verdict rendered and to grant a new trial of this cause. And
26 for grounds for this motion defendant shows to the court the following to wit:

The court refused to admit competent and material evidence offered by the defendant as to the execution and making of a release by Francisco Martin and plaintiff for the alleged loss which occur-ed under the policy of insurance issued by defendant.

2.

Also because the court refused to admit material and competent evidence offered by defendant as to the existence of an invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military and usurped power and martial law, within Porto Rico, and limiting the evidence over the objection of defendant to an actual invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military and usurped power and martial law within the immediate locality where the property was situated.

(3.)

Because the court refused to admit competent and material evidence offered by defendant to show the commotion by a court-martial of the United States officers of several persons accused of riot, insurrection and incendiarism on the night of the 19th. of A-gust, 1898, in the place where the property was situated and at the time of the burning of the same, said court-martial having been conducted September 8th. 1898.

(4.)

Because the court refused to admit the evidence of witnesses living in the place where the property was situated and within a half hour's drive therefrom as to the general conditions within their common knowledge showing the existence of an invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military and usurped power a*b*d martial law within Porto Rico at the time of said loss, and because the court held that such testimon- was not competent, and excluded the same unless it could be shown by defendant that such witnesses of acts of riot, insurrection, civil commotion, military and usurped power or martial law at the time and immediate place where such loss occur-ed.

27 5.

Because the court admitted on the trial incompetent and immaterial evedence of plaintiff as to payment of premium to defendant prior to the year 1898.

6.

Because of the giving to the jury the portions of the charge excepted to by the defendant and in not sustaining such exceptions.

7.

Because the court refused to direct the jury upon the request of defendant after they had returned a verdict in a lump sum and before they had been pooled to retire and return a separate verdict showing the amount found by them separately upon the building and upon the stock of goods, merchandise, and provisions, as provided by the policy.

8.

Because the court refused to give certain charges to the jury at the request of defendant as appears by -he record herein *and* were material and proper.

9.

Because the verdict is contrary to the law and evidence in the case.

(Sig.) F. H. DEXTER,
HORTON & CORNWALL,
*Attorneys.*

And afterwards to wit, on the same day and year last aforesaid, came the defendant herein by its attorneys and filed in the clerk's office of the said court his certain motion in arrest of judgment, in said cause which motion is clothed in the words and figures following, to wit:

*Motion in Arrest of Judgment.*

Now comes the defendant and moves the court to arrest the judgment herein for the reasons:

28 1.

Because the declaration herein does not set forth a cause of action against this defendant.

2.

Because plaintiff has no right to sue and recover for the alleged cause of action.

3.

Because the court erred in over-ruling the demurrer of defendant upon ground that the declaration did not state a cause of action, and because the action herein was improperly brought in assumpsit, whereas as covenant was the proper form of action, it appearing form the declaration that the policy sued for was under seal.

4.

Because a verdict should have been directed by the court for defendant at the close of the case.

5.

Because of the giving to the jury that part of thr charge or portions thereof excepted to by defendant and in refusing the charges and the modifidation of the court's charge as requested by defendant.

6.

Because the verdict is irregular and not in accordance with the evidence in the case.

(Sig.) F. H. DEXTER & HORTON & CORNWALL.

And afterward, to wit, on the 24th, day of May of the same year last aforesaid an entry was made upon the journal of the said court in the said cause which said entry is clothed in words and figures following, to wit:

Now comes the defendant herein by its attorney F. H. Dexter Esq. and calls up his motions heretofore filed for a new trial and in arrest of judgment, both of which motions are over-ruled, and the defendant is given until June 20th, to file bill of exceptions.

29 And afterwards, to wir, on the 12th day of June, 1902, there was filed in the clerk's office of said court in said cause a certain petition for writ of error, which said petition is as follows, to wit:

30 In the District Court of the United States for Porto Rico, Sitting at Ponce.

RUPERTO MARTIN, Executor of the Will of Francisco Martin, Deceased, *v.* THE ROYAL INSURANCE COMPANY. } Petition for Writ of Error and Supersedeas.

The defendant above named, The Royal Insurance Company, feeling itself aggrieved by the verdict of the jury and the judgment entered in this cause against it on the twenty-first day of May, in the year of our Lord one thousand nine hundred and two, at the May term of this court, in the city of Ponce, Porto Rico, comes now by F. H. Dexter and Horton & Cornwell, its attorneys, and petitions said court for an order allowing said defendant to prosecute a writ of error to the honorable the Supreme Court of the United States, under and according to the laws of the United States, in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all fur-

ther proceedings in this court be suspended and stayed until
31 the determination of said writ of error by the said Supreme Court of the United States, and your petitioner will ever pray.

F. H. DEXTER AND
HORTON & CORNWELL,
*Attorneys for Defendant.*

And afterwards, to wit, on the same day last aforesaid there was filed in the clerk's office of said court in said cause a certain assignment of errors which said assignment of errors is as follows, to wit:

32 In the District Court of the United States for Porto Rico, Sitting at Ponce.

RUPERTO MARTIN, Executor of the Will of Francisco Martin, Deceased,
*v.*
THE ROYAL INSURANCE COMPANY.
} Assignments of Error.

Comes now The Royal Insurance Company, plaintiff in error, by its counsel, and respectfully represents that it feels itself to be aggrieved by the proceedings and judgment of the district court of the United States for Porto Rico in the above entitled cause, and assigns error thereto as follows:

*First.* That the district court of the United States for Porto Rico erred in not sustaining the demurrer of plaintiff in error, because of the failure of said declaration to state a cause of action, and because of the improper bringing of this action in assumpsit
33 instead of covenant, it appearing upon the face of the said declaration that the insurance policy sued on was under seal.

*Second.* The said district court of the United States for Porto Rico erred in allowing defendont in error to prosecute this suit as executor of Francisco Martin, deceased, after overruling the demurrer to said declaration, as stated in assignment number one.

*Third.* The said district court of the United States for Porto Rico erred in refusing to grant the motion of plaintiff in error to strike out paragraph four of the replication of defendant in error, because that part of the said replication was not good matter of reply, was argumentative and not responsive or proper to the plea to which it purported to reply.

*Fourth.* The said district court of the United States for Porto Rico erred in sustaining the objection of defendant in error as to the receipts offered in evidence by plaintiff in error, signed by Francisco Martin, as showing a release by him, and excluding the same from the jury as evidence of such release.

*Fifth.* The said district court of the United States for Porto Rico erred in refusing to allow witnesses of plaintiff in error, Pedro Juan Rossaly and Enrique Fritze, to testify as to the existence of an

invasion, foreign enemy, rebellion, insurrection and riot, civil
34 commotion, military and usurped power or martial law within Porto Rico and in the locality in which the property alleged to have been insured was situated, and because the court, by its ruling and directions, limited the testimony of such witnesses, as well as of the witnesses José Hilario Roche, Maria Balbina and Manuel Peña, under the fourth plea of defendant, to testimony of the actual existence of an invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military and usurped power or martial law within the immediate locality where the property insured was situated, and at the precise time of the loss thereof by fire.

*Sixth.* The said district court of the United States for Porto Rico erred in refusing, upon the objection of defendant in error, to admit the record of the court martial of United States officers, showing the conviction, September 8, 1898, by said marshal, at a session held in the city of Ponce, Porto Rico, and within a short distance of the location of the said property, of several persons accused of riot, insurrection, and incendiarism, committed by them on the night of the nineteenth of August, 1898, in Juana Diaz, being the same time and place when the property insured was destroyed by fire.

*Seventh.* The said district court of the United States for Porto Rico erred in excluding the testimony offered by the said witnesses
35 above named, who lived in the said locality of the fire, and within a short distance therefrom, as to their common knowledge showing the existence of an invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military and usurped power or martial law within the island of Porto Rico generally, and in the vicinity of the said town of Juana Diaz at the time of said fire, and because the court held that such testimony was not competent, and excluded the same, unless it could be shown by plaintiff in error that such witnesses were actual spectators of such acts of riot, invasion, insurrection, civil commotion, military and usurped power or martial law at the immediate time and place where and when such fire occurred.

*Eighth.* The said district court of the United States for Porto Rico erred in allowing the case to go to the jury, and entering up a judgment upon the verdict of the latter, because of the failure of testimony to show that proofs had been furnished, as set forth in the fifth plea of plaintiff in error, or that the company had legally waived the same, and because there was no testimony or evidence to justify the finding or judgment in favor of defendant in error, because the evidence failed to establish any right or interest of defendant in error in and to said loss, or the right of action to recover the same, it having been established by the evidence of defendant in error that Francisco Martin, to whom the policy had been
36 originally issued, had surrendered the property insured to a firm or society of which he was only a sleeping or silent partner.

*Ninth.* The said district court of the United States for Porto Rico erred in refusing to direct the jury, upon request of plaintiff in error,

after they had returned a verdict in a lump sum, and before the jurors had been polled, to retire and return a separate verdict, showing the amount found by them separately upon the building and upon the stock of goods, merchandise and provisions, as provided by the policy for insurance sued on.

*Tenth.* The said district court of the United States for Porto Rico erred in charging the jury, over the exceptions of plaintiff in error, that if they found for the plaintiff below, they might find for an amount "not to exceed the amount of twenty thousand dollars, and "not to exceed the amount of insurance on the property." And the court also erred in coupling with such charge the language:

"You are limited to the actual loss that occurred, and also limited to the actual insurance on the property, not exceeding in any event twenty thousand dollars,"

which action of the court was duly excepted to.

*Eleventh.* The said district court of the United States for Porto Rico erred in refusing the request of plaintiff in error for the positive charge

37 "that there could be under no circumstances a verdict for more than the face value of this policy, which is sixteen hundred pounds,"

which ruling of the court was then and there excepted to.

*Twelfth.* The said district court of the United States for Porto Rico erred in that part of the charge as follows:

"Now a resident general agent of a foreign insurance company, with the general charge of its business, and the right to manage its business generally in the district where he resides, has the power in law to waive the conditions in the policy as to notice of the loss, or as to presentation of proofs of the loss. He may waive it by contract as to the payment of what he thinks should be paid on account of that loss, that is, a waiver of any production of proof as to the loss, or of any notice, and if the general agent has that power and acts upon it, oral notice from the party that the loss has occurred, in such a way as to induce that insured party to believe reasonably that no other notice is required of the loss, and that no other proofs are required, then that, in law, is a waiver of that notice or of proofs. As a matter of law, when that general agent was applied to and told of this loss, and was informed that it was a total loss, if you believe from the testimony that he informed the insured that he would report it to the company, and would notify him if they determined to pay, and no further notice was required by him, or any proofs of loss were required by him, except being informed that it was a total loss of the property, that, in law, was a waiver of the production by the insured to the general agent of the company of proof to the amount of that loss. If you believe from the testimony that the company, by their general agent, induced the insured,—reasonably induced him, that is, that the talk was such that a man of ordinary intelligence could reasonably infer from it,—that no other proofs or

notice were required, then it was a waiver of any other proofs or notice. If, for instance, the company being notified orally of the destruction of the property, if they refuse to pay any loss upon
38 a totally different ground than that of no proofs of loss being presented to them, then that was a waiver, in law, of any proofs of loss being presented."

Plaintiff in error assigns such portion of the charge as error, because, first, of the statement of law as to the authority of the general agent to waive the conditions as to loss or presentation of proofs, and, second, because it eliminated the question of whether such waiver was before or within the time within which the insured was, by the terms of the policy, required to furnish proofs of the loss as required by the terms and provisions of the policy. Such portion of the charge was at the time excepted to.

*Thirteenth.* The said district court of the United States for Porto Rico erred in refusing to grant the charge asked by plaintiff in error, as follows:

"The *the* condition would be binding as furnishing proofs of loss within fifteen days, and would preclude the plaintiff from recovery if the proofs of loss were not furnished within that time,"

which ruling of the court plaintiff in error then and there excepted to.

*Fourteenth.* The said district court of the United States for Porto Rico erred in charging the jury, over the exceptions of plaintiff in error, as follows:

"The defense mainly relied upon here is that this loss occurred during an invasion, riot, civil commotion, military or usurped power, or martial law. A fair construction of that condition of the
39 policy, in the opinion of the court, is that that must, in order to excuse this company from liability in case of loss of property by fire, that invasion by a foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law, must have been occurring in the section of the country where this loss occurred, or within the locality, and within such a radius of country where that loss occurred, that danger arose to property by reason of the existence of that rebellion, invasion, insurrection, civil commotion, and military or usurped power or martial law. And I further tell you, gentlemen, that if you believe from the evidence that this destruction of this property did not occur from any of these causes, and occurred from a cause independent of the existence of any foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law, that then you should find for the plaintiff in damages whatever you think may have been his loss, provided you believe the insurance existed on the property. This is a reasonable construction of the law, as the court thinks, of this and these conditions of the policy."

Plaintiff in error assigns this charge of the court as error, because it varied the terms and contract contained in the policy of insurance sued upon and offered in evidence, and which had been accepted by the insured, and that the effect of such ruling was to narrow the

application of the language of such policy and to limit the defence of plaintiff in error thereunder to proof that the loss was a direct result of one of those enumerated conditions or causes.

*Fifteenth.* The said district court of the United States for Porto Rico erred in refusing the request of plaintiff in error for a charge as follows:

40 "If you believe that the loss occurred during the existence of invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law, then you will find for the defendant,"

to which ruling plaintiff in error then and there excepted.

*Sixteenth.* The said district court of the United States for Porto Rico erred in its ruling upon the said request of plaintiff in error, in the following language:

"I understand you are claiming, for instance, if the Germans invaded San Juan and got into San Juan, and if this property and this place had been destroyed by a boy dropping a match, that the company would be released. The court has not that view."

*Seventeenth.* The said district court of the United States for Porto Rico erred in refusing to charge the jusy as requested by plaintiff in error,

"that if the jury believes from the evidence that if at the time of the fire, or prior thereto, the title to the stock of goods which had been insured had passed out of Francisco Martin and into another person, or other persons, the plaintiff herein could not recover,"

to which action of the court the plaintiff in error then and there excepted. Plaintiff in error assigns this ruling as error, because of the testimony of plaintiff, Ruperto Martin, that the stock of goods recovered by the insurance, was owned and controlled at the time of the fire by the society or firm of Martin Brothers, of which the insured, Francisco Martin, was, at the time of said loss, only a sleeping or silent partner.

41 *Eighteenth.* The said district court of the United States for Porto Rico erred in entering up judgment in favor of said Ruperto Martin, executor, upon the verdict as rendered by the jury, because the said judgment is contrary to law, and the verdict of the jury contrary to the law and to the evidence.

*Nineteenth.* The said district court of the United States for Porto Rico erred in not sustaining the motion of plaintiff in error in arrest of judgment.

Wherefore, the said Royal Insurance Company prays the honorable court to examine and correct the errors assigned, and for a reversal of the judgment of the said district court of the United States for Porto Rico, entered in the above entitled cause.

F. H. DEXTER AND
HORTON & CORNWELL,
*As Attorneys.*

(Indorsement:) Ruperto Martin, executor, *vs.* Royal Insurance Co. Assignment of errors. Filed — clerk's office, United States district court. June 12, 1902. Ricardo Nadal, clerk by H. H. Scoville, deputy.

And afterwards, to wit, on the same day last aforesaid an entry was made on the order book of said court, which said order is as follows, to wit:

42 In the District Court of the United States for Porto Rico, Sitting at Ponce.

RUPERTO MARTIN, Executor of the Will of Francisco Martin, Deceased,
*v.*
THE ROYAL INSURANCE COMPANY.
} Order Allowing Writ of Error.

On this the 12th day of June, 1902, in the city of San Juan, in the above entitled cause, upon motion of F. H. Dexter and Horton & Cornwell, attorneys for defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that the writ of error be and hereby is allowed to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby is fixed at twelve thousand dollars, and the said bond when approved shall operate as a supersedeas.

WM. H. HOLT, *Judge.*

43 And afterwards, to wit, on the same day last aforesaid there was issued out of said court a certain writ of error which said writ of error is as follows, to wit:

In the District Court of the United States for Porto Rico, Sitting at Ponce.

RUPERTO MARTIN, Executor of the Will of Francisco Martin, Deceased,
*v.*
THE ROYAL INSURANCE COMPANY.
} Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable William H. Holt, judge of the district court of the United States for Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said district court of the United States for Porto Rico before you, between Ruperto Martin, as executor of the will of Francisco Martin, deceased, defendant in error, and The Royal Insurance Company, plaintiff in error, a mani-

fest error hath happened to the great damage of the said
44 Royal Insurance Company as by its complaint appears.

We believing that error, if any hath been, should be duly corrected, and full and speedy justice done to parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and the proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, before the first day of the next term of this the Supreme Court of the United States next ensuing after the issue of this writ, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 12th day of June in the year of our Lord one thousand nine hundred and two.

Allowed to operate as a supersedeas upon giving bond as provided.

WM. H. HOLT,
*Judge of the District Court of the United States for Porto Rico.*

This 12th day of June, 1902.

[SEAL.] RICARDO NADAL,
*Clerk of the District Court of the United States for Porto Rico, and the Seal of said Court,*
By H. H. SCOVILLE, *Deputy.*

45 (Indorsed:) Filed June 12th, 1902.

And afterwards, to wit, on the same day last aforesaid there was issued out of said court a certain citation which said citation is as follows, to wit:

In the District Court of the United States for Porto Rico, Sitting at Ponce.

RUPERTO MARTIN, Executor of the Will of Francisco Martin, Deceased,
*v.*
THE ROYAL INSURANCE COMPANY. } Citation.

UNITED STATES OF AMERICA, *ss:*

To Ruperto Martin executor of the will of Francisco Martin, deceased, and Charles M. Boerman, his attorney of record, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for Porto Rico

at Ponce, in the above entitled cause, wherein The Royal Insurance Company in plaintiff in error and you are defendant in error,
46 to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of June, in the year of our Lord one thousand nine hundred and two.

WM. H. HOLT,
*Judge of the District Court of the United States for Porto Rico.*

Attest: RICARDO NADAL,
*Clerk of said Court,*
[SEAL.] By H. H. SCOVILLE, *Deputy.*

UNITED STATES OF AMERICA, *Island of Porto Rico,* } *ss:*

I hereby certify that I served the within citation on Charles M. Boerman, attorney of record of Ruperto Martin, executor of the will of Francisco Martin, deceased, on the 12 day of June, 1902, at the city of San Juan, Porto Rico, by then and there delivering to
47 the said Charles M. Boerman, attorney of record, personally, a true copy of the within citation.

Dated San Juan, Porto Rico, this 12 day of June, 1902.

E. S. WILSON,
*United States Marshal,*
By H. S. HUBBARD, *Deputy.*

(Indorsement:) Ruperto Martin, executor, *vs.* Royal Insurance Co. Citation. Filed — clerk's office, United States district court. June 12, 1902, Ricardo Nadal, clerk by H. H. Scoville, D. C.

48 And afterwards, to wit, on the 13th day of June A. D., 1902, there was filed in the clerk's office of said court in said case a certain bond which said bond is as follows, to wit:

In the District Court of the United States for Porto Rico, Sitting at Ponce.

RUPERTO MARTIN, Executor of the Will of Francisco Martin, Deceased,
*v.*
THE ROYAL INSURANCE COMPANY.
} Bond on Writ of Error.

Know all men by these presents: That we, the Royal Insurance Company, a corporation organized under the laws of Great Britain, as principal, and The Fidelity & Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, as

surety, are held and firmly bound unto Ruperto Martin, executor of the will of Francisco Martin, deceased, plaintiff above named, in the sum of twelve thousand dollars, to be paid to the said Ruperto Martin, executor, or to the estate of the said Francisco Martin, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our successors, representatives and assigns, firmly by these presents.

49 Sealed with our seals this thirteenth day of June, 1902.

Whereas, the above named defendant, The Royal Insurance Company, has sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above entitled cause by the district court of the United States for Porto Rico;

Now therefore, the condition of this obligation is such that if the above named defendant, The Royal Insurance Company, shall prosecute said writ to effect and answer all costs and damages if it shall fail to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect.

(Signed) ROYAL INSURANCE CO.,
By SOBRINAS DE ASQUIAGA,
*General Agents.*
THE FIDELITY AND DEPOSIT CO. OF MD.
E. L. ARNOLD, *Att'y & Agent.*

Approved this thirteenth day of June, 1902, for the purposes of the supersedeas.

WM. H. HOLT, *Judge.*

(Indorsement:) In the district court of the United States for Porto Rico. Ruperto Martin, executor. *vs.* Royal Insurance Co. Filed — clerk's office, United States district court, June 13th. 1902 Ricardo Nadal, clerk of the court by H. H. Scoville deputy.

50 And afterwards, to wit, on the 20th day of June, A. D., 1902 there was filed in the clerk's office of said court a certain bill of exceptions in said cause which said bill of exceptions is as follows, to wit:

In the District Court of the United States for Porto Rico.

RUPERTO MARTIN, Executor of the Will of Francisco Martin, Deceased,
*vs.*
THE ROYAL FIRE INSURANCE COMPANY.
} Bill of Exceptions.

*Be it remembered* that at a term of the district court of the United States for Porto Rico held in the city of Ponce on the 19th day of May, A. D. 1902, a cause therein pending wherein Ruperto Martin, executor of the last will of Francisco Martin, deceased, was plaintiff and The Royal Insurance Company was defendant, came on to be

heard before the Honorable William H. Holt, judge of the said court, at which time came the said parties by their respective attorneys, and thereupon the said issues in manner aforesaid joined between the said parties came on to be tried, and the jurors of the jury aforesaid whereof mention is within made, being called likewise, came and were sworn to try said issues upon the merits of said cause in the manner aforesaid joined.

And thereupon the plaintiff, to maintain the issues on his part, appeared as a witness in said cause, and having been first duly sworn, testified as follows:

(By Mr. BOERMAN, att'y for pl'ff:)

Q. What is your name?
Ans. Ruperto Martin Vasquez.
Q. Where do you live?
Ans. Now in Santa Ysabel.
Q. How old are you?
Ans. Thirty years.
Q. What is your business?
Ans. Commission merchant.
Q. What relation have you been to Francisco Martin?
Ans. Son.
Q. Is he alive or dead?
Ans. He is dead.
Q. Has he made a will?
Ans. Yes.
Q. Please take a look at this and say what it is?

Mr. DEXTER (att'y for def't): I object to the witness stating what this paper is. The paper will speak for itself if offered in evi-
dence.
51 Mr. BOERMAN: This is the first notarial copy of the will of which the witness is the executor.

Mr. DEXTER: We object as from the certificate of the translation it does not appear to be a good translation.

The COURT (to witness): Are you executor of the last will of your father?

Ans. Yes.

The COURT: I do not think that it is a good translation of the original. It does not appear so. I will order that the translation be made later, and will admit it in evidence.

Q. To your knowledge did your father own in his lifetime any building in the barrio of the "Coto"?
Ans. Yes.
Q. Where is the Barrio "Coto"—near what place?
Ans. It is on the military road, five kilometers from Ponce.
Q. What was kept in that building by your father?
Ans. It was a house of commerce and a dwelling-house.

Q. What was in that house of commerce—what kind of commerce?

The COURT: When?

Q. In the year 1898 did your father have that building—was he the owner of it?

Ans. Yes.

Q. What was kept in that building?

Ans. Provisions and merchandise.

Q. What interest did your father have in this goods and stock?

Ans. He was a silent partner.

Q. Do you know if there was any insurance on that building, or that stock?

Ans. Yes.

Q. Where is that policy of insurance?

Ans. On the night of the fire it was lost.

Q. Was there a search made for it; did they look for it?

Ans. Yes.

Q. Was it found?

Ans. No.

Mr. BOERMAN: I gave notice to the defendant to produce a copy of that policy and they have produced it, and I now offer it in evidence.

The COURT: Read it.

And thereupon the plaintiff to further maintain the issues on his part offered and introduced in evidence a certain document entitled a copy of the policy issued by the defendant to the insured, Francisco Martin, on the — day of ——, 18—, and which is in words and figures as follows, to wit:

52

Board of directors.
B. Brocklebank, Esq., Ch.
G. H. Horsfall, Esq., D. C.
Michael Belcher, Esq.
Josias Brooks, Esq.

Royal Fire and Life Insurance Company.

Porto Rico,
A. McCormick, Esq.,
Agent.

Policy number: 1720984. Sum insured: £1600

Premium: 12th M'ch '77 to 12th M'ch '78 per ann. £42.

Rate: 52/6 (Rate reduced to 50/- in 1883) Renewal to 12 M'ch '99.

Wm. Cliff, Esq.
David Duncan, Esq.
T. D. Hornby, Esq.
D. Malcomson, Esq.
Wm. J. Morrow, Esq.
M. Hyslop Maxwell, Esq.
Henry Royds, Esq.
John Torr, Esq., M. P.
Manager,
Jno. H. McLaren, Esq.

This policy of insurance witnesseth, that Francisco Martin, of Ponce, P. R., hereinafter called the insured, having paid to the undersigned, as authorized agent of the Royal Insurance Company

(hereinafter called the company) the sum of — for insuring against loss or damage by fire, as hereinafter mentioned, the property hereinafter described in the sum or several sums following, viz:

£700 (seven hundred pounds)

On the building, timber built and roofed with galvanized iron situated in the Barrio del Coto district of Ponce, P. R., occupied part as a dwelling and partly as a shop.

£900 (nine hundred pounds)

On stock in trade in said building consisting of provisions and groceries.

Each item of this policy is separately subject to the conditions of average printed on the back hereof.

The company hereby agree with the insured (but subject to the conditions on the back hereof, which are to be taken as part of this policy) that if the property above described, or any part thereof, shall be destroyed or damaged by fire, at any time between the — day of —— 187–, and four o'clock in the afternoon of the — day of —— 187–, the company will, out of their capital, stock and funds, pay or make good to the insured the value of the property so destroyed, or the amount of such damage thereto, to an amount not exceeding in respect of each or any of the several matters above specified, the sum set opposite thereto respectively, and not exceeding in the whole the sum of —. And also not exceeding, in any case, the amount of the insurable interest therein of the insured at the time of the happening of such fire.

In witness whereof, we, two of the directors of the said company, by our authorized agent, have hereunto set our hands, and have caused the common seal of the said company to be hereunto fixed.

Dated at Porto Rico this — day of —— in the year of our Lord one thousand eight hundred and seventy-- and issued there.

Examined.

Entered.

(Circle for Seal.)

_____,

_____,

*Directors,*

By their attorney, —— ——,

*Agent of the Company.*

You are requested to examine the conditions of this policy and to observe that no policy is valid unless it bears the company's seal and has received the signatures of two directors by their attorney or attorneys.

53 The conditions referred to in this policy are as follows:

1. Any material mis-description of any of the property proposed to be hereby insured, or of any building or place in which property to be so insured is contained, or any omission to state the existence of any hazardous trade or of any apparatus in or by which heat is produced, other than grates and common fire places therein, and any mis-statement of or omission to state any fact material to be

known for estimating the risk whether at the time of effecting the insurance or afterwards, renders this policy void as to the property effected by such mis-description, mis-statement or omission respectively.

2. If after the risk has been undertaken by the company anything whereby the risk is increased be done to, in or upon property hereby insured, or to, upon or in any building or place in which property hereby insured is contained, or if any property hereby insured be removed from the building or place in which is is hereby described as being contained, or if any addition to the risk arise from any other cause whatsoever without in each and every such cases the assent or sanction of the *country* signified by endorsement hereon, or if the insured shall refuse or neglect to pay any further premium which may be demanded in consequence of any increase of risk, the insurance as to the property thereby effected ceases immediately thereupon to attach. And if any reason for such alteration or addition, or from any other cause whatever the company or its agents shall desire to terminate the insurance effected by this policy, it shall be lawful for the company or its agents so to do by notice to the insured, or his representative, and to require this policy to be given up for the purpose of being cancelled, provided if in any such case the company shall refund to the insured a rateable proportion for the unexpired time thereof of the premiums received for the insurance.

3. This policy does not cover property held in trust or on commission unless expressly described as such; no china, glass, looking-glasses, jewels, clocks, watches, trinkets, medals, curiosities, manuscript, prints, paintings, drawings, sculptures, musical, mathematical or philosophical instruments, patents, models, and moulds unless specially mentioned in the policy; nor deeds, bonds, bills of exchange, promissory notes, money, securities for money, stamps and books of account; nor gun-powder; nor loss or damage by fire happening during the existence of any invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law within the country or locality in which the property insured is situated, unless proof be made to the satisfaction of the directors that such loss or damage was not occasioned by or connected with, but occurred from a cause or causes independent of the existence of such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law, and this policy does not cover loss or damage occasioned by or through any earthquake or hurricane or through the spontaneous fermentation or heating of the subject insured; nor goods destroyed or damaged while undergoing any process by which the application of fire heat is necessary; nor loss or damage by explosion, except loss or damage to a building or property contained therein caused by explosion of gas in such building, not being a building in which gas is manufactured.

4. No insurance proposed to the company is to be considered in force until the premium be actually paid, nor receipts for any pre-

mium of insurance shall be valid or available for any pur-
54 pose whatever, except such as are printed and issued from the company's office and signed by one of the clerks or agents of the office and impressed with the seal of the company, and any condition or proviso contained in, endorsed upon, or referred to in any such receipt shall be taken as part of this policy.

5. This policy ceases to be in force as to any property hereby insured which shall pass from the insured to any other person otherwise than by due operation of law, unless notice thereof be given to the company, and the subsistence of the insurance in favor of such other person be declared by a memorandum endorsed hereon by, or on behalf of the company.

6. On the happening of any loss or damage by fire to any of the property hereby insured, the insured must forthwith *five* notice in writing thereof to the company, and within fifteen days at latest deliver to the company as particular an account as may be reasonably practicable of the several articles or matters damaged or destroyed by fire, and also of all other articles and matters insured by this policy, with the estimated value of each of them respectively, having regard to their several values at the time of the fire and in support thereof give all such vouchers, proofs and examinations and other evidence as may be reasonably required by or on behalf of the company, together with, if required, a statutory declaration of the truth of the account; and in default thereof no claim in respect to such loss or damage shall be payable or sustainable unless or until such notice, account, proofs and explanations or evidence respectively shall have been given and produced as aforesaid, and such statutory declaration, if required, shall have been made.

7. No profit nor advantage of any kind is to be included in any claim of loss or damage under this policy and if the claim be in any respect fraudulent, or if any false statutory declaration be made or used in support thereof, or if the fire be occasioned by or through the procurement or with the knowledge or connivance of the insured all benefit under this policy is forfeited.

8. In case of damage by the removal of property to escape conflagration this company will contribute thereto in proportion the sum insured hereby shall bear to the whole value of such property before removal; but the company shall not be held liable for property stolen.

9. The company may, if they think fit, at their option, re-instate or re-place the property damaged or destroyed instead of paying the amount of the loss or damage, and may join with any other company or insurers in so doing in cases where the propert- is also insured elsewhere.

10. On the happening of any damage by fire to any building or place or property or effects within any building or place in respect of which a claim is or may be made under this policy, the company without being deemed wrongdoers may by their authorized officers and servants or others, enter into and for a reasonable time remain in possession of such building or place, property or effects, for all

reasonable purposes relating to or in connection with the insurance hereby effected, and this policy shall be evidence of leave and license and authority for that purpose.

11. The insured must give notice to the company of any insurance or insurance made elsewhere on the property hereby insured, or any part thereof, the particulars of which must be endorsed on the policy, and unless such notice be given and endorsement be made, the insured will not be entitled to any benefit under this policy.

55 12. If at any time of any loss or damage by fire happening to any property hereby insured there be any other subsisting insurance or insurance whether effected by the insured or by any other person covering the same property, this company shall not be liable to pay or contribute in respect of such loss or damage more than its rateable proportion of such loss or damage.

13. In all cases where any other subsisting insurance or insurances whether effected by the insured or by any other person on any property hereby insured, either exclusively or together with any other property in or subject to the same risk only, shall be subject to average, the insurance on such property under this policy shall be subject to average in like manner.

14. If any difference shall at any time arise between the company and the insured, or any claim under this policy as to the amount of any loss or damage by fire, and no fraud be suspected, every such difference as and when the same arises shall be referred to the arbitration and decision of two indifferent persons, one to be chosen by the party claiming and the other by the company, or in case of disagreement between them then of an umpire to be chosen by the arbitrators before entering on the reference; and the costs of the reference shall be in the discretion of the arbitrators or umpire, as the case may be, who shall award by whom and in what manner the same shall be paid; and the decision of the arbitrators or umpire, as the case may be, shall be final and binding on all parties, and this condition shall be deemed and taken to be an agreement to refer as aforesaid. And it is hereby expressly stipulated and declared that the obtaining of an award by such arbitrators or umpire, as the case may be, shall be a condition precedent to the liability or obligation of the company to pay or satisfy any claim under this policy for the loss or damage in respect to which any such difference may have arisen and to the enforcement of any such claim.

15. In all cases where this policy is void or ceased to be in force under any of the foregoing conditions all moneys paid to the company in respect thereof shall be forfeited.

16. The directors of the company shall not be sued nor made personally responsible for this insurance until the funds of the company are first exhausted, and the agent shall in no case be responsible, either on account of any legal or other investigation which they may find it necessary to institute for the satisfaction of the company; nor can their personal property be attached on account of any alleged loss by the insured.

17. If in any case the company shall be enabled to re-instate or repair the buildings because of any provisions in the acts in force for regulating the alignment of streets or direction of buildings, the company shall, in every such case, only be liable to pay such sum as would be requisite to re-instate or repair such buildings if the same could lawfully be re-instated to their former condition.

*Conditions of Average.*

1. It is hereby declared and agreed that whenever a sum insured is declared to be subject to the conditions of average, if the property so covered shall at the breaking out of any fire be collectively of greater value than the sum insured thereon then this company shall pay or make good such a proportion only of the loss or damage as the sum so insured shall bear to the whole value of the said property at the time when such fire shall happen.

56 2. But it is at the same time declared and agreed that if any property included in such average shall at the breaking out of any fire be insured by any other policy which whether subject to average or not shall apply to parts only of the buildings or places or of the property to which such average extends, then this policy shall not cover same excepting only as regards any excess of value beyond the amount of such more specific insurance which said excess is declared to be under the protection of this policy, and subject to average as aforesaid.

3. And it is further declared and agreed that if the insured shall claim under this policy for loss or damage to property embraced in the terms of any average policy extending as well to other buildings or places, or to other property not included in the terms of this insurance, and if at the breaking out of any fire there shall not be any property in such other building or places, or any such other property actually at risk be protected by such policy, then so far as regards the settlement of any claim under this policy, the terms and liability thereof shall be held to be concurrent in all respects with those of such other policy.

57 Q. State what kind of goods were contained in that building?

Ans. Provisions and merchandise.

Q. What do you mean by merchandise?

Ans. Clothing and textures.

Q. Nothing more—no other articles?

Ans. Shoes and hats and everything carried in a commercial house.

Q. Did it include any china?

The COURT: Do not lead him.

Q. It did not include anything else?

Ans. It had coffee, tobacco, rice and other articles.

The COURT: Is the last date of the renewal shown on the policy?

Mr. BOERMAN: Yes, the last time of the renewal was to the 12th of March, 1899.

The COURT: It must have been made then on the 12th of March, '98.

Mr. BOERMAN: To prove when it was renewed, I will produce in evidence the receipts from 1897 to 1898.

The COURT: The last renewal was when?

Mr. BOERMAN: From March 12th, 1897, to March 12 1898.

Mr. DEXTER: That being the case they only come down to March 1898. Besides they are in Spanish.

The COURT: I will let you offer those receipts.

Mr. DEXTER: Defendants excepts to the ruling of the court.

And thereupon the plaintiff to further maintain the issued on his part offered and introduced in evidence certain documents, entitled receipts from the defendant for the payment of the amounts required as renewal premiums for the renewal of the aforesaid policy of insurance, which said receipts are in words and figures as follows, to wit:

EXHIBIT C.

58 "The Royal Insurance Company.

Agents for Porto Rico—Messrs. Feddersen & Co.

Receipt No. 728880. 3RD OF MARCH, 1886.

Received from Don Francisco Martin the sum of forty pounds sterling for the continuance of polic- number 1720984 of this company, amounting to £1600 sterling of sum insured for one year from 12th of March 1886 to 12th of March 1887 at four o'clock in the afternoon. Sum insured £1600 Premium £40.

FEDDERSEN, *Agent.*

"The Royal Insurance Company.

Agents for Porto Rico—Messrs. Fedderson & Co.

Receipt No. 857450. 12TH OF MARCH, 1887.

Received from Mr. Francisco Martin the sum of forty pounds sterling for continuance of policy No. 1720984 of this company amounting to £1600 sterling of sum insured for one year from 12th of March 1887 to 12th of March 1888 at four o'clock in the afternoon. Sum insured £1600. Premium £40.

FEDDERSEN & CO.,
A. SCHNEIDER, *Agents.*

"The Royal Insurance Company.

Agents for Porto Rico—Messrs. Feddersen & Co.

Receipt No. 857498. 12TH OF MARCH, 1888.

Received from Don Francisco Martin the sum of forty pounds sterling for the continuance of polic- number 1720984 of this company amounting to £1600 sterling of sum insured for one year from

12th of March 1888 to 12th of March 1889 at four o'clock in the afternoon Sum insured £1600. Premium £40.

FEDDERSEN & CO., *Agents.*

"The Royal Insurance Company.

Agents for Porto Rico—Messrs. Feddersen & Co.

Receipt No. 857536. 11TH OF MARCH, 1889.

Received from Don Francisco Martin the sum of forty pounds sterling for the continuance of policy No. 1720984 of this company amounting to £1600 sterling of sum insured for one year from 12th of March 1889 to 12th of March 1890, at four o'clock in the afternoon Sum insured £1600 Premium £40.

pp. FEDDERSEN & CO.,
A. SCHNEIDER, *Agts.*

"The Royal Insurance Company.

Agents for Porto Rico, ——.

No. 1159917. SAN JUAN, 12*th of March*, 1890.

Received from Don Francisco Martin the sum of forty pounds sterling for the continuance of policy No. 1720984 of this company for one year from the 12th of March 1890 to the 12th of March 1891 at four o'clock in the afternoon. Sum insured £1600. Premium, £40§

SOBRINOS DE ESQUIAGA, *Agents.*

The Royal Insurance Company.

Agency in Porto Rico.

No. 1159811. SAN JUAN, 12*th of March*, 1891.

Received from Don Francisco Martin the sum of forty pounds sterling for the continuacion of policy No. 172984 for one year from the 12th of March 1891 to the 12th of March 1892 at four o'clock in the afternoon. Sum insured £1600 Premium £40§

SOBRINOS DE ESQUIAGA, *Agents.*

59 "The Royal Insurance Company.

Agency in Puerto Rico.

No. 1159863. SAN JUAN, 12*th March*, 1892.

Received from Don Francisco Martin the sum of forty pounds sterling for the continuance of policy No. 1720984 of this company for one year from the 12th of March 1892 to the 12th of March 1893 at four o'clock in the afternoon. Sum insured £1600. Premium £40.

SOBRINOS DE ESQUIAGA,
Per ALVAN DOMINGUEZ, *Agents.*

"The Royal Insurance Company.

Agency in Porto Rico.

No. 1159917. SAN JUAN, *12th of March*, 1893.

Received from Don Francisco Martin the sum of forty pounds sterling for the continuance of policy No. 1720984 of this company for one year from the 12th of March 1893 to the 12th of March 1894 at four o'clock in the afternoon. Sum insured $1600. Premium £40.

SOBRINOS DE ESQUIAGA,
Per JUAN B. ARSUAGA, *Agents.*

"The Royal Insurance Company.

Agency in Porto Rico.

No. 1159989. SAN JUAN, *12th of March*, 1894.

Received from Don Francisco Martin the sum of forty pounds sterling for the continuance of policy No. 1720984 of this company for one year from the 12th of March 1894 to the 12th of March 1895 at four o'clock in the afternoon. Sum insured £1600. Premium £40.

SOBRINOS DE ESQUIAGA, *Agents.*

"The Royal Insurance Company.

No. 1409964. SAN JUAN, *March 12th*, 1895.

Received of Don Francisco Martin of Ponce the premium below noted for the continuance of policy No. 1720984 of this company in the amount of £1600 sterling for one year from the 12th of March 1895 to the 12th of March 1896 at mid-day. Premium £40.

SOBRINOS DE ESQUIAGA, *Agents.*

The Royal Insurance Company.

No. 1410062. SAN JUAN, P. R, *M'ch* 12, 1896.

Received of Don Francisco Martin the premium below noted for the continuance of policy No. 1720984 of this company in the amount of £1600 sterling for one year from the 12th of March 1896 to the 12th of March 1897 at mid-day. Premium £40.

SOBRINOS DE ESQUIAGA, *Agents.*

"The Royal Insurance Company.

(Compañia de Seguros "Royal.")

No. 1620666. SAN JUAN, *March 12th*, 1897.

Received of Don Francisco Martin of Ponce, P. R. the premium below noted for the continuance of policy in this company issued under the number 1720984, by which is insured the sum of £1600

sterling, from the 12th of March 1897 to the 12th of March, 1898, at mid-day. Premium £40.

SOBRINOS DE ESQUIAGA, *Agents.*

(These were marked as "Exhibit C for pl'ff.")

60 The COURT: There is no receipt from March 1898 to March 1899?

Mr. BOERMAN: No, sir.

Q. Please state whether or not the premium was paid from March 1898 to March 1899?

Ans. Yes, it was paid.

Q. Where is that receipt for that payment?

Ans. It was lost that night also.

Q. Which night?

Ans. The night of the fire.

Q. Was it searched for?

Ans. Yes.

Q. Did they diligently look for it?

Ans. Yes.

Q. What was the result of the search?

Ans. It was not found.

Q. Do you know where it is now?

Ans. No, sir.

Mr. BOERMAN: I would like to ask if the defendant has produced a record of the payment of that premium from their books according to the notice we served on them?

The COURT: If it is not produced you can use secondary evidence.

Q. Can you state the contents of that receipt for the year 1898 to 1898; what was the premium that year on that amount?

Ans. £50.

Q. Can you tell us whether that building and those goods are still in existence?

Ans. They do not exist.

Q. What happened to that building?

Ans. It was destroyed by fire.

Q. In what year?

Ans. In the year 1898.

Q. In what month of that year?

Ans. In the month of August.

Q. Do you remember the date?

Ans. The 19th and 20th of August.

Q. What became of the stock that was in the building?

Ans. It was all destroyed by fire.

Q. State whether or not the company was notified of the fire?

Ans. Yes, it was notified.

Q. About how long after the fire?

Ans. Twenty four hours scarcely.

61 Q. To whom was the notice given personally?

Ans. To Mr. Felice its agent in Ponce.

Q. To whom else was it given?

Ans. To Mr. Esquiaga, the agent in the capital.

Q. What agent made this insurance?

Ans. I do not know.

Q. Who were the agents of that company that year in Ponce?

Ans. Felice y Compañia.

Q. Who were the agents of the company that year in San Juan?

Ans. Sobrinos de Esquiaga y Compañia.

Q. And these are the persons that you said before were notified?

Ans. Yes.

Q. What happened after you notified them?

Ans. I received a letter from them in which they stated the policy would not be paid.

Q. From whom was the letter?

Ans. From Sobrinos de Esquiaga y Cia.

Q. Where is that letter?

Ans. It is lost.

Mr. DEXTER: We ask to have that part of the testimony containing a statement as to the contents of that letter stricken from the record as it is incompetent and not material.

The COURT: How can you prove the contents of that letter except by oral testimony?

Mr. BOERMAN: I offer this as an exhibit.

And thereupon the plaintiff, to further maintain the isssues on his part, offered and introduced into evidence a certain document which is in words and figures as follows, to wit:

"In the United States District Court for Porto Rico.

GUADELUPE VASQUEZ MARTIN ET AL.
*against*
THE ROYAL INSURANCE COMPANY.

To the above named defendant: Please take notice to produce your letter press copy of a certain letter directed by you through your agents, to wit: Sobrinos de Esquiaga to Francisco Martin about October 1898 in which you stated that you would not pay the insurance on the building and chattels insured by him because you claim that the fire happened through the invasion, to produce such copy at the trial of this action, in default whereof secondary evidence will be introduced of the contents thereof.

(Signed) C. M. BOERMAN,
*Plaintiff's Attorney.*

Service of the above notice accepted May 15th, 1902.
(Signed) F. H. DEXTER AND
HORTON & CORNWALL,
*Attorneys for Defendant.*"

The COURT: Let it go in.
(Entered and marked "Exhibit D for pl'ff.")

Q. When did your father die?
Ans. In October, 1899.
Q. That is after the fire?
Ans. Yes.

62 Q. What were the contents of that letter that you received from the agents of the company, Esquiaga y Cia.?

The COURT: Tell the substance of it only.

Q. What was it in substance?
Ans. That as these events were produced by a riot they were not compelled to pay.
Q. To which events do they refer?
Ans. To the events that took place in the Coto.
Q. At what time?
Ans. On the 19th and 20th of August.
Q. When did the fire happen?
Ans. The 19th and 20th of August.
Q. How long after the fire did you receive that letter from them?
Ans. More or less, a couple of months after.
Q. Did you have any conversation with Mr. Felice, the agent in Ponce, about that fire?
Ans. Yes.
Q. What did Mr. Felice say about that payment of that loss?
Ans. Mr. Felice gave me a letter and told me to communicate it to Sobrinos de Esquiaga in the capital.
Q. Did he tell you that he would communicate it or that you should communicate it?
Ans. That I must do it.
Q. Did you do it?
Ans. Yes.
Q. Did he personally, with his own words, tell you anything about the payment or the non-payment of this loss?
Ans. No, sir.
Q. Please state whether or not you received any other letter about that time?
Ans. Yes, I received another one.
Q. Did they ever pay any part or the whole of the insurance?
Ans. Nothing.
Q. Where were you at the time the fire originated?
Ans. Here in Ponce.
Q. When did you arrive at the Coto after the fire?
Ans. When the fire was still slumbering.
Q. Did you arrive at night or in the day-time?

Ans. It was at night.

Q. At what hour?

Ans. About three or four o'clock in the morning.

Q. Please state if the provisions and merchandise you have mentioned were in the same building where they were insured?

The COURT: No where were they, ask him.

Q. State, if you know, where were the provisions and merchandise at the time of the fire?

Ans. In the house.

63 Q. In which building?

Ans. In the store-house.

Q. Was that the house you mentioned as being insured?

Ans. Yes.

Q. State what was left of the building after the fire—if anything was left?

Ans. Nothing but cincers.

Q. State from your own knowledge if anything was left of the provisions and merchandise after the fire?

Ans. Nothing was left.

Q. You stated before that the building was owned by your father, but that as to the stock in it—the provisions and merchandise—he was a "socio en comandita." Please explain a little more about that?

Ans. He formed a part of the firm and was a silent partner.

Q. Under what name was that company?

Ans. Martin Bros. & Company.

Q. Who were the brothers?

Ans. Myself and Arturo Martin.

Q. Who is Arturo Martin?

Ans. My brother.

Q. Who else was a member of your firm besides your father, yourself and your brother?

Ans. There were no others.

Q. State what interest, to your knowledge, your father had in those provisions and merchandise?

Mr. DEXTER: I object to the question because the notarial document of the organization of that mercantile society would show that.

The COURT: It does not require a document.

Mr. DEXTER: Under the commercial code you could not have a partnership without that notarial document.

The COURT: The court does not know that law. Proceed.

Q. What was the extent of the interest of your father in that partnership?

Ans. Ten thousand dollars.

Q. That is more than the amount of the insurance is it not?

Mr. DEXTER: The question is objected to because it is immaterial and incompetent.

The COURT: You have already proven what interest he had in the concern.

Q. And the policy was continued all the time in your father's name was it?

Ans. Yes.

Q. For whose benefit?

Ans. For the benefit of all three of us.

64 Q. You mean to say that so far as the merchandise and provisions are concerned?

I will withdraw that question.

Q. Please state if you have received any communication from Esquiaga & Company after their second communication to you?

Ans. After receiving the second one in which they stated they would not pay me, I have received no other.

Q. Please state whether or not you had been in Coto shortly before the fire occurred?

Ans. The day before.

Q. State in what condition was Coto then so far as tranquil-ity was concerned?

Ans. It was in normal condition.

Q. Had you been before that time in Coto?

Ans. Yes.

Q. How long before?

Ans. Two days.

Q. In what condition was it then?

Ans. Normal.

Q. You mean to say two different days in the week before the fire?

Ans. Yes; different days in the same week.

Cross examination.

(By Mr. DEXTER:)

Q. How old are you, Mr. Martin?

Ans. Thirty years old.

Q. At the time of this fire what were you engaged in; what profession or occupation?

Ans. I was here in Ponce with my family.

Q. How long before that time had you been living in Coto?

Ans. Three years.

Q. How long before the fire was it that you and your family went down to Ponce?

Ans. Fifteen days, more or less.

Q. Did all the family go down with you to Ponce?

Ans. The ladies of the family always lived in Ponce but we men came to Ponce now and then.

Q. What was you interest or connection in that business of your father prior to the fire?

Ans. I was an active partner.

Q. When was this society formed under the name of "Martin Hermanos"?

Ans. In 1897. I believe it was in March.

Q. Was that accomplished by means of some writing before a notary?

Ans. Yes.

65 Q. Did your father then retire from business as an active partner?

Ans. Yes.

Q. And the business that formerly belonged to him was turned over to Martin Hermanos?

Ans. Yes.

Q. Where did your father live after the organization of that society?

Ans. He lived here, and there.

Q. Did he give any attention to the business after this organization?

Ans. Yes.

Q. Who managed the business?

Ans. Martin Brothers.

Q. You managed the business did you?

Ans. Yes.

Q. Up to the time of the fire everything was peaceful and quiet in Coto was it?

Ans. Yes.

Q. No excitement?

Ans. None.

Q. No mobs?

Ans. None.

Q. Nobody was threatened with death or the destruction of stealing of their property?

Ans. Nobody.

Q. Nobody's property was taken out of their house by bandits or armed mobs?

Ans. After the insasion?

Q. Yes.

Ans. Nobody.

Q. After the invasion nothing of that kind occurred?

The COURT: I think that is going too far. The question is whether this property was destroyed by reason of a riot or invasion.

Mr. DEXTER: In the time of a riot. I am proving by this witness whether or not this was in any——

The COURT: You do not fix the time. It might be a year from the time of the fire. I do not think you can attack his credibility by immaterial matter.

Q. All these questions that I have asked you refer to a few days before this fire—upon the day of the fire or a day or two before it?

Ans. Nobody was deprived of anything.

Q. Nothing of the kind had happened at any time up to the time of the fire?

Ans. Nothing.

Q. You had no occasion to make any complaint about being attacked on or about the time of this fire?

Ans. No, sir.

Q. How do you know that the premium was paid from March 1898 to March 1899?

Ans. Because I am the same man who paid it.

Q. To whom did you pay it?

Ans. To the house of Felice.

66 Q. Do you remember to which member of the firm?

Ans. I do not remember.

Q. Do you remember the date?

Ans. It was about the date, sometimes two or three days after it was due. We used to carry current accounts with the house.

Q. Speaking of this particular payment in the year 1898, when did you pay that, more or less?

Ans. I do not remember exactly the date of its becoming due.

Q. Was it in April?

Ans. I do not remember.

Q. You think you paid £50 premium?

Ans. Yes.

Q. In what kind of money was that?

Ans. I do not know exactly whether I paid it in cash or not for sometimes the house would put it in the account of Martin Hermanos y Cia., but I think I paid cash generally.

Q. Do you remember receiving this letter from Sobrinos de Esquiaga (exhibiting a letter to witness)

Ans. Yes.

Q. Where is the original of that letter?

Ans. I do not know; it is lost.

Q. And the other letter which you say you received and which was lost, was it received before or after this?

Ans. After this one the one in which they said they would not pay.

Q. And you have lost that?

Ans. Yes.

Q. Do you remember about how long after this one?

Ans. More or less about a couple of months.

Q. How long after this one of the 19th of October, 1898 did you receive the other letter in which you say the company refused to pay you? About how many weeks or months after?

Ans. I do not remember exactly.

Q. About one month?

Ans. Probably a month; one or two months.

Q. Did you see Mr. Felice when you went down to pay this premium?

Ans. I do not remember.

Q. Did I understand you to say in your testimony this mourning that you talked with Mr. Felice and notified him of the loss?
Ans. Yes, I saw him.
Q. Was he the one you notified about the fire?
Ans. Yes.
Q. About when was that?
Ans. The same day or the day after the fire.
Q. You are sure about that?
Ans. Yes.
67 Q. How did you notify him?
Ans. Orally, and he made me communicate with the house of Esquiaga in the capital.
Q. Did you at once notify them of the loss?
Ans. The same day or the day after.

The COURT: I have heard nothing about the value of the property—the value of the building or of the merchandise.
Mr. BOERMAN: I will ask him if it is necessary.

(Rebuttal.)

By Mr. BOERMAN:

Q. When you testified that there were no threatenings or attacks upon persons before the fire, you mean so far as your knowledge was concerned?
Ans. There was nothing.
Q. There may have been, so far as you do not know, some kind of these things?
Ans. Before the fire there was absolutely nothing.
Q. That is, while you were there?
Ans. Yes.
Q. The time you refer to is from after the invasion up to the time of the fire, is it?
Ans. Yes.
Q. So far as your knowledge of the building extends, what was it worth?
Ans. The commercial building was worth 4000 pesos provincial, and the dwelling-house was worth 5000 pesos provincial.
Q. To your knowledge as a partner in that business, of what value was the merchandise and the provisions at that time in that store?
Ans. The provisions and merchandise were worth approximately 15000 pesos.

By the COURT:

Q. What did you say the building was worth?
Ans. There were two buildings—one a store and the other a residence.
Q. Were they both in one building?
Ans. Yes, joined together.
Q. What were they worth?

Ans. 4000 pesos and 5000 pesos provincial.

68 (By Mr. BOERMAN:)

Q. Of what materials were the buildings?

Ans. The commercial house was a frame building, and the dwelling house adjoining it was of stone.

Q. What were they covered with?

Ans. Zinc.

Q. In what condition were the houses at that time?

Ans. The stone building had been built the previous year but the frame building was about 25 years old.

Q. You say the brick building was built about a year before: Was it built anew or re-built?

Mr. DEXTER: I object to that line of examination. The policy shows that this building was of timber and not of "mamposteria."

The COURT: Ask the question.

Mr. DEXTER: Please note an exception.

The COURT: I understand this is all one building.

Mr. BOERMAN: Yes.

The COURT: And some of it was built of stone.

Mr. BOERMAN: Yes.

Mr. DEXTER: He has testified there were two buildings—one of which was used as a dwelling house, and which had a certain value, and another was a commercial house having a certain value. We object to any testimony as to any other house than that insured in the policy.

By the COURT:

Q. Was this all one building—a part of it being brick and a part of it being wood and frame?

Ans. No, the frame building had been built twenty five years previously.

Q. Were these two buildings joined together?

Ans. Yes, and they had communication through doors.

Q. How far apart were they?

Ans. They were no distance; they were united.

Mr. DEXTER: He has testified that the "mamposteria" building was built about a year before and that this frame building was built twenty five years before. We object to any testimony as to any new building built a year or so ago.

The COURT: I am inclined to think the policy would not embrace a new building. Repeat the question, Mr Boerman.

69 Q. Was that brick building built anew or was it the old building repaired?

Mr. DEXTER: I object to the question as the policy of insurance speaks of but one building.

The COURT: I will permit you to prove the building was repaired, if that be a fact. If it was a new building the insurance will not cover it.

Mr. DEXTER: The defendant desires to except to the admission of any testimony which has for its purpose to show that this building was a new building and one not mentioned in the policy.

The COURT: That is exactly what the court decides; if it is a new building there cannot be an- testimony as to it.

Mr. DEXTER: The policy was issued on one building, and not on any other.

The COURT: The policy was issued on one building, and if it was merely repaired it would remain on all of it. It is unreasonable to my mind to suppose that a man would own a house, a portion of it being brick—one-half, and the other part frame and not take out insurance on the whole building. Proceed.

Q. Before the brick building was built what was there in the same place on the same lot?

Ans. There was a little dining-room which was thrown down.

Q. Was that dining-room a part of the whole house insured?

Ans. Yes.

Q. What else was there besides that little dining-room, if anything?

Ans. Nothing.

Q. In place of that dining-room there were placed how many other rooms? Of what did that brick building consist that was built in the place of the little dining-room?

Mr. CORNWELL: I think that is immaterial, if the court please. He has testified that there was nothing but a little dining-room and that that was torn down, and anything new put there would not be covered by the policy.

The COURT: It looks that way to me also. I think you are confined to your policy, Mr. Boerman.

Q. So far as you know from your side the conditions of the policy were complied with, were they?

The COURT: I do not think that is competent. That is a conclusion of law.

Q. Was there any release or discharge given by you to that company?

The COURT: That is a matter of defense. It is not necessary to ask him about that. There might not be any testimony offered in support of any release.

70 By the COURT:

Q. This insurance was renewed on March 12, 1898, and the property was burned in August, 1898. What was the value of the frame building at the time it was destroyed in that fire?

Ans. Three or four thousand pesos.

Q. Which? Three thousand or four thousand? How much do you think it was worth?

Ans. About three thousand pesos: it was old.

Q. This insurance was made in March, 1898. Now, of the stock of goods that was in there at the time, what proportion remained on hand in August, 1898?

Ans. In August there must have been approximately the amount of 15,000 pesos, which I have mentioned. In March there were more.

Q. Were there 15,000 pesos on hand in August of the same goods that were on hand in March previous?

Ans. In regard to the merchandise it may be so, but not in regard to the provisions because they were renewed every now and then.

Q. What was the value of the stock of goods on hand in March 1898?

Ans. I cannot state it precisely, but it was more than in August, 1898.

Q. State what amount you thought was on hand in March, 1898?

Ans. Approximately 20,000 pesos.

Q. Now, in this matter of goods on hand in March, 1898—how many and what value do you think remained in August, 1898?

Ans. it was continually renewed and there must have been some 15,000 pesos.

Q. What old goods remained on hand?

Ans. About clothes and things of that kind, together with coffee, they are things which were kept in stock; but in regard to provisions they were renewed from time to time.

Q. I want you to state what, in your opinion, was the value of the old goods that remained on hand in August at the time of the fire?

Ans. In regard to tobacco, coffee and dry-goods there were some 12,000 pesos.

By Mr. CORNWELL:

Q. You testified that there were approximately 12,000 pesos' worth of tobacco and sugar, and that class of supplies at the time of the fire, did you not?

The COURT: He did not state that. They were old goods on hand in March and 12,000 pesos of goods on hand in August.

Q. How much tobacco was there on hand at the time of the fire?

Ans. There may have been about 4,000 pesos' worth.

71 Q. How long had you had that in the store?

Ans. From about March and April when the crop begins.

Q. And it all came in after the months of March and April?

Ans. Oh, no, there was some old stock there.

Q. That old stock had been disposed of long before the fire?

Mr. BOERMAN: I object to that. The witness did not state so. He stated a part of it was.

The COURT: I think he stated as plain as plain could be that the provisions were changed, but that the coffee and some other goods remained—a good many of them. I will sustain an objection to that question.

Q. How much of the old stock did you have on hand at the time of the fire?

Ans. It embraced about 15,000 pesos.

Q. I refer to the old stock of tobacco—not of the new crop but of the old crop?

Ans. About 500 pesos.

Q. How much coffee did you have on hand at the time of the fire?

Ans. Fifteen or twenty sacks, more or less.

Q. How much coffee did you have on hand at the time of renewing the insurance policy in March, 1898?

Ans. Then probably there were 250 or 300 quintals.

Q. What was the value of coffee, more or less, as you remember, in March, 1898?

Ans. I think it was worth 25 pesos.

Q. How much rice did you have on hand in March, 1898.

Ans. I cannot state it precisely.

Q. How many days' stock of rice do you carry on hand? How many days did it take you to dispose of the stock of rice you generally carried?

Ans. It all depends upon the quantity.

Q. You never bought over a month's supply of rice at a time did you?

Ans. Yes, I have bought it in bags.

Q. But generally you have bought supplies of rice that lasted a less time?

Ans. Yes, I used to generally buy Valencian rice. Sometimes fifty sacks.

(Rebuttal.)

(By Mr. BOERMAN:)

Q. When was the tobacco crop gathered in that year 1898—what month?

Ans. From April to June; beginning with April.

72 Q. And besides these bales of the old crop how much tobacco at the time of the fire was there of the new crop?

Ans. It was not packed; it was loose in boxes—in quintals put in boxes.

Q. How many quintals then, more or less?

Ans. In leaf there may have been forty quintals; in rolls 400 twists.

Q. What was the value of a roll?

Ans. Rolls are bought at 8 pesos and sold at 10 or 12.

Q. What was the value of a quintal in leaf?

Ans. From 3 to 30 pesos.

Q. Of what quality was that tobacco that you had at the store—what price?

Ans. It was of all kinds—some low and some high.

Mr. Boerman for plaintiff here announced that the plaintiff rested his case.

And thereupon, the defendant, The Royal Insurance Company, in order to maintain the issues on its part, introduced as a witness Mr. P. J. ROSALY, who, after being duly sworn, testified as follows:

P. J. ROSALY (for the defense).

(By Mr. DEXTER:)

Q. Please state your name?

—. P. J. Rosaly.

Q. Residence and occupation?

Ans. Sugar planter; connected with banking house of De Ford & Company; I live in Ponce.

Q. Were you ever connected with the firm of Felice y Cia.?

Ans. Yes.

Q. Between what periods of time?

Ans. 1895 and 1899.

Q. What time in 1899?

Ans. In December.

Q. While you were connected with Felice y Cia. did you have anything to do with the business of the Royal Insurance Company, of which they were the agents?

Ans. Yes, I was in charge of it.

73 Q. State what, if any, claims were made to you, or the agents with whom you were associated, by Francisco Martin, or anybody for him, by which any particular statement or account of property alleged to have been lost by the said Francisco Martin by fire in the Coto in August, 1898, was rendered?

Ans. Yes, a fire occurred in the Coto Laurél.

Q. What, if any, statement of account showing in detail, or otherwise the goods claimed to have been lost, was furnished to the agents?

Ans. They never presented any detailed account.

Q. When, if you know, was it that the plaintiff, or anybody representing him or Francisco Martin, was notified that the company refused to pay? How long after the fire?

Ans. It must have been two or three months.

Q. Did Felice & Company have any authority to settle this loss without reference of the same to the main office in London?

Ans. No, they did not.

Q. What action was taken by you or the agent with reference to submitting this matter to the company at London to determine whether or not the loss would be paid.

Ans. When Mr. Martin went to the office to report the fire I told him we would have to report the matter to Sobrinos de Esquiaga in San Juan, who in turn would report to the company.

Q. When was that, right after the fire?

Ans. Some days after the fire; yes.

Q. Did you request of either Francisco Martin or the plaintiff the detailed proofs of loss required by the policy?

Ans. I did ask him to make a statement of the loss.

Q. Did he do so?

Ans. No, sir.

Q. Was that before or after you notified him that the company would not pay because the loss occurred during a riot?

Ans. That was before.

Q. Now how long before?

Ans. As soon as I saw him when he came to speak about the fire, I told him to make the statement.

Q. What statement do you refer to—the statement contained in the conditions of the policy?

Ans. No, the statement as to the goods insured.

Q. Did he furnished any statement or proofs whatsoever?

Ans. No, sir; none at all.

Q. Did you ever have anything to do with the plaintiff or Francisco Martin about cancelling that policy or making a release?

Ans. Yes, when the answer came from London to San Juan and thence to Ponce I reported it to the defendant, and they then proposed to release the policy and return the premium since they could not collect the amount.

Q. What sum of money, if any, was paid to Francisco Martin to release the company?

Ans. The amount of the premium since the fire up to the due date. I do not remember the exact amount.

74 Q. I now hand you these two papers, and ask you whether or not you remember them?

Ans. Yes.

And thereupon the defendant, The Royal Insurance Company, to further maintain the issues on its behalf, offered and introduced in evidence a certain document, in duplicate, the official translation of which is as follows:

"Received of Messrs. Felice, Acosta & Company, on account of Sobrinos de Esquiaga, general agents of the Royal Insurance Company, the sum of one hundred and seventy four pesos and twelve cents as a return of the premiums of the policy No. 1720984.

Ponce, February 4th, 1899.

(Signed) FRANCISCO MARTIN.

$174.12 P. R. Cy. (Duplicate.)"

The above is a true translation.

(Signed) Z. VALL SPINOSA,

*Interpreter, U. S. Dist. Court for Porto Rico.*"

(Marked "Exhibit 1 for def't.)

Q. Will you please explain the circumstances under which these receipts were given and what for?

Ans. When Mr. Martin was notified that the company would not pay the amount of the insurance——

Mr. BOERMAN: I object to it on the ground that the receipts

speak for themselves, and further that this is a receipt from a person who is now dead, and this witness at that time was an employé of the actual defendant in this case, and he should not be allowed to testify to any transaction between him and the dead person.

Mr. DEXTER: I will withdraw the question for the present and ask him this one:

Q. Did you ever have any conversation with Ruperto Martin, the plaintiff in this case about the return of this premium, or the settlement of the policy?

Ans. Yes.

Q. Please state what that was?

Ans. I had several conversations with him about the case.

Q. Whom did he represent in these conversations?

Ans. His father.

Q. What were these conversations and what were the results of them?

Ans. After the first conversation—I could not say exactly whether it was Ruperto Martin or his father——

The COURT: You are confined to what occurred between you and the living man in this case, Ruperto Martin.

75 Mr. BOERMAN: I object to the question in the form given because no time is set out. If it was after the death of Francisco Martin it may be competent, but if it was in the life of Francisco Martin there was no authority in anybody to act for him at that time, and even if Ruperto Martin had acted it was without authority?

The COURT: Suppose they prove he was his agent.

Mr. BOERMAN: But they have not proved it.

Q. With reference to the conversation with Ruperto Martin and to the cancellation of the policy, please state what he said?

Mr. BOERMAN: I object to the question until it is shown that Ruperto Martin was authorized by his father to make the agreement, if there was any.

The COURT: Is this confined to the conversations after the death of the father or before?

Q. When were these conversations?

Ans. Before the death of the father.

Q. Whom did Ruperto Martin claim he represented?

Mr. BOERMAN: I object to the question. No claim he could have made as to agency would be binding.

The COURT: An agency cannot be proven by a declaration of the agent himself. If this witness knows in any way, by the statement of the father, that this party was his agent then the statements of this witness are competent in the matter.

Q. Do you know whether Ruperto Martin was authorized by his father to treat with you in this matter?

Ans. Yes.

Q. How often did he come there representing the father, or bearing any letters from the father?

Mr. BOERMAN: I object to the question. He should be asked how he knows it.

The COURT: You can cross-examine him.

Q. Please give those conversations and the effect of them and what was done by reason of these conversations with reference to the repayment of the premiums and the cancellation of the policy?

Ans. What was said from the beginning, you mean.

Q. Yes, with reference to the return of the premium and the cancellation of the policy?

Ans. When I first stated to him that the matter had to be submitted to Messrs. Sobrinos de Esquiaga at San Juan and that they, in their turn, would submit it to the head officer of the company in London, he asked me if it was not better to go to San Juan and see Sobrinos de Esquiaga, and I told him it was better, and he did go to San Juan and after returning he called on me again, and
76 he repeatedly said that he could not do anything with them because they could not do anything until they heard from London.

Q. What was said or agreed about the return of the premium or the cancellation of the policy?

Mr. BOERMAN: I object to it because it is hearsay.

The COURT: The declarations of the agent are always competent against the principal.

Mr. BOERMAN: I would request your honor to allow me to cross-examine the witness now as to this point.

The COURT: I cannot do that. You can cross-examine him when the time comes for it. Repeat the question.

Q. was repeated and Mr. Dexter added the words: "And the release of the loss," ma-ing the question read: What was said or agreed about the return of the premium or the cancellation of the policy, and the release of the loss?

Ans. When the answer came from London he was notified that they would not pay for the reasons stated.

Q. Do you remember about when that was, approximately?

Ans. Somewhere about November. I am not positice about the date. He was notified that the company would not pay for the reasons stated, and then Mr. Martin——

Q. Which one—Francisco or Ruperto?

Ans. Francisco Martin, the father?

The COURT: I do not think you can prove anything about that.

Q. What conversation or agreement was made twith this plaintiff here—Ruperto—about the release?

Mr. BOERMAN: I object to the question as it is leading.

The COURT: Ask what was said, if anything.

Q. What was said, if anything, with this plaintiff; not with the old gentlemen, but with this plaintiff here?

Mr. BOERMAN: I object to this question also as under the conditions of the policy and the custom the premium is always returned, even if the loss has been paid for after the time of the fire and up to within one year. The premium is always paid back; that is, by law, always payable.

The COURT: Do you mean to say that under the law the insurance company is bound to pay back the premium in addition to the loss.

Mr. BOERMAN: To pay back the premium for the balance of the year.

The COURT: Ask the question.

Mr. DEXTER: The consideration was—the company took the position that it was not liable and it returned this premium in order to retain the release.

77 The COURT: The whole premium or from the time of the fire

Mr. DEXTER: I think from the time of the fire.

Mr. BOERMAN: There was no consideration.

The COURT: I will control that and hear what he has to say. Ask the question.

Q. What was said, if anything, with this plaintiff about this matter?

Ans. I could not say whether there was any agreement with him.

The COURT: Proceed to something else then.

Q. Do you know the conditions that prevailed in the barrio of Coto Laurel on August 19th, 1898?

Ans. Yes.

Q. With reference to insurrection, riot and invasion?

Ans. Yes.

Q. Please state what that was, of your own knowledge?

Ans. Do you mean to say if I was present?

Q. Do you know whether or not there was any invasion in progress at the time and place of your own knowledge?

Ans. Yes.

Q. What was that invasion?

An-. The American troops were there a little while before and I went there personally the day after the fire.

Q. What was the condition of affairs as you found them?

The COURT: That is not competent.

Q. What time of the day did you arrive?

Ans. In the morning about 8 o'clock.

Q. What were the conditions that you found there at that time?

Ans. The American troops were there with a captain in charge—some prisoners and some natives were running away from the place.

Q. Do you know the occasion of the troops coming there?

Ans. Yes.

Q. What was that? Please state what you saw there that morning, and what was the cause of the troops coming there?

Ans. I saw the rest of the fire there of the house that was burned, and some prisoners.

Q. When did the troops land in Porto Rico?

Ans. July 25th in Guanica and 28th in Ponce.

Q. From the time that they landed in Ponce in which direction did they proceed?

Ans. Toward San Juan by the military road; towards Utuado by the military road, and they were at Guanica and Arroyo.

78 Q. On August —, 1898, or about that date what conditions did the troops encounter about that place, and in that vicinity?

Ans. There had been some trouble about there at Soto, and the troops had been ordered to go down and occupy Coto Laurél.

Q. Did you have occasion to go yourself to the military commander about that time?

Ans. Yes.

Q. Whom did you see?

Ans. I saw General Wis*l*on.

Q. Did you see this plaintiff there when you went there to see Gen. Wilson?

Ans. Yes.

Q. About when was that?

Ans. Some days before the fire.

Q. About how many days more or less?

Ans. Say, three.

Q. Did you hear what he said?

Ans. Do you mean Mr. Martin?

Q. Yes.

Mr. BOERMAN: I object to it as it is a conversation between two parties at that time that had no interest in this suit. This man was not executor then.

Mr. DEXTER: I want to contradict the other witness.

Q. What was said by him there at that time, two or three days before the fire?

Ans. He said that the place was in a condition of riot and he was not secure and his properties were in danger.

Q Did he say anything about the provisions of the store being stolen and taken out of the place?

Ans. His own place, you mean?

The COURT: Do not lead the witness. Gentlemen of the jury this testimony is only competent in so far as it may tend to contradict the plaintiff in the case.

Q. Do you know if on August 19th, 1898, there was any insurrection or riot or civil commotion in Coto Laurél?

Ans. Yes, the fire was attributed to that.

The COURT: Do not tell what you heard.

Q. Please state the general condition existing there with reference to riot, civil commotion or insurrection at that time—Aug. 19, or in those days immediately before the fire?

Ans. All I know about the conditions is what I heard.

Q. Where were you on August 19, 1898?

Ans. Here in Ponce.

Q. How far was Coto from Ponce?

Ans. About one half an hour, or less than that.

Q. About what time immediately prior thereto did you yourself see anything of a riot, civil commotion or insurrection?

79 The COURT: Confine it to that time and place?

Ans. I was not there immediately before the fire.

Q. Do you know if in the vicinity of Ponce and Coto between the time the Americans landed in Porto Rico and up to the time of this fire, what the general condition of the community around about Coto and Ponce was with reference to insurrection and riot?

Mr. BOERMAN: I object to the question as the place is not fixed.

The COURT: Put it at that place or the immediate vicinity.

Mr. DEXTER: I think the fair construction of the policy is not to limit it to the immediate place, but the language of the policy is as to the existence of a riot.

The COURT: It must be in that place; in that immediate vicinity.

Q. Do you know whether there was martial law in Coto Laurél at that time?

Ans. No, I do not know it.

Q. Was there immediately upon the occasion of the fire?

Ans. Yes.

The COURT: I think what occurred afterwards is not competent.

Q. Do you know of your own knowledge whether any prisoners were taken and accused of this fire?

Ans. Yes.

Q. Who were they, if you know?

Ans. I do not know their names.

Q. Where were they tried?

Mr. BOERMAN: I object to the question. It is not competent.

The COURT: No, that is not competent.

Cross-examination:

Q. When you said that he did not present any particulars to you, you mean that he did not present any particulars to your firm of Felice, Acosta & Company?

Ans. Yes.

Q. And you do not know of your knowledge, whether he did or did not present any particulars to the firm of Sobrinos de Esquiaga?

Ans. I do not know.
Q. As a matter of fact, you told him to present the claim to Esquiaga?
Ans. No, sir; I asked him to send it in.
Q. Did you refer him to Esquiaga?
Ans. Afterwards, yes.
Q. What did you say?
Ans. I said: Go there and report it to Esquiaga
80 Q. As I understand, you said before that with the plaintiff, Ruperto Martin, there was no agreement in any way with you.
Ans. I said——

The COURT: He has already stated that.

Q. How many days before the fire did you go to Coto?
Ans. Several months—one or two months.
Q. And so, you have not been to Coto from several months before the fire until the day after the fire?
Ans. Yes.
Q. When you came to Coto what time was it?
Ans. About eight o'clock in the morning.
Q. Are you sure that it was not later than that?
Ans. It was in the morning: I left here about 7.30 and must have arrived there about then.

(Witness retires.)

And thereupon the defendant to further maintain the issues on its part, introduced as a witness HENRY C. FRITZE, who being duly sworn, testified as follows:

(HENRY FRITZE) for defense.

(By Mr. DEXTER:)

Q. Mr. Fritze, what is your full name?
Ans. Henry C. Fritze.
Q. Where do you live?
Ans. Here in Ponce.

Mr. DEXTER: I now offer in evidence a copy of the letter from Sobrinos de Esquiaga to Mr. Martin.
Mr. BOERMAN: I object to the use of this copy because we have never had a notice from the defendant to produce the original, and this may be a true copy and may not.
The COURT: I think you will have to notify them to produce the original before you can introduce secondary evidence.

Q. Mr. Fritze, do you know the plaintiff in this case?
Ans. Yes.
Q. Did you see him anywhere a few days before August 19, 1898?
Ans. I saw Mr. Martin one night at General Wilson's office.
Q. About when was that if you remember?

Ans. A few days after the American troops had disembarked.

Q. Did you hear what he said?

81 Mr. BOERMAN: I object to the question because this is hearsay and secondary evidence, unless they first called him and asked him and then wanted to contradict him with another witness.

The COURT: I think you should have asked the party whether he said so and so. You should have examined him on these points. You can attack him on these points by proving a different state of facts, but you must first ask him what he said in reference to it.

Mr. DEXTER: I will ask your honor's permission then to recall Mr. Martin in order to examine him on this point.

The COURT: Well, call him.

(Mr. Fritze makes way for Mr. Martin who takes the stand.)

RUPERTO MARTIN—recalled.

Cross-examination (con.).

By Mr. DEXTER:

Q. Did you not have occasion to go and see General Wilson and ask for protection from the disordered conditions that prevailed in and near Coto Laurél before the fire?

Ans. The same day that the American troops landed I was here in Ponce. I heard reports from the Coto that they were going to burn the whole barrio that night, and then I sought General Wilson to make him understand that I had interests there, because on that same day General Miles had issued a proclamation in which he said he would defend the lives and property of the people. I asked him to lend me force enough to defend my interests. He immediately gave me 30 or 40 men. We left about 11 o'clock that night. The interview that night was at about 9 o'clock, and we left Ponce about 11. We arrived at the second river and there we had to camp because the troops would not go further. In the morning we proceeded to the Coto and we arrived and found nothing had occurred and the troops remained there in the advance.

Q. Is it not a fact that your place was visited a few nights before the fire and a large amounts of provisions were taken out ij carts by some unknown men.

Ans. It was not so it happened.

Q. How was it?

Ans. Bad people from Ponce arrived there drinking and they continued to drink and then in the store they began to talk about all the Spaniards, and as I was the son of a Spaniard the moment they left the store I ordered the whole establishment to be locked up and came to Ponce.

Q. Did not they take forcibly a large amount of provisions out of the store?

Ans. No; they only broke the glass.

82 Q. And nobody, prior to the fire, and within a short time prior thereto took away any provisions forcibly from your place—merchandise of any kind?

Ans. No, sir; except those people who came through violence into my house.

Q. Did you not appear before the court to accuse and testify as to certain persons having stolen and taken away a large amount of provisions and merchandise?

Mr. BOERMAN: I object to that; the witness is a willing witness and should not be impeached.

The COURT: No, he is your witness. Ask the question.

Q. was read.

Ans. I went before the court because these individuals, after the store had been closed, broke down and tore, but without entering the store——

Q. What date was it that these individuals came there?

Ans. Some days before the fire, I do not remember the date.

Q. Did you not appear before the court martial and accuse certain persons of having set fire to this store on August 19, 1902.

Mr. BOERMAN: I object to the question as it is after the fire.

The COURT: The question is, did he not appear; if it is not a fact that he did. Ask the question.

Q. was read.

Ans. No, sir.

Q. Have you the original of that letter (exhibiting) Mr. Martin?

Ans. No, I have not.

Q. Where is it?

Ans. It is lost.

Mr. DEXTER: I ask now, in as much as the witness has admitted that he received the original and that it is lost that we be allowed to introduce this in evidence.

Mr. BOERMAN: We were not asked to find it; we may have found it.

The COURT: The witnesses testified it was lost.

Mr. BOERMAN: But it may be found.

The COURT: I think it is competent. Let it go in.

And thereupon the defendant, to further maintain the issues on its part, offered and introduced in evidence a certain document (Exhibit 2 for def't), which, copied, is in words and figures as follows, to wit:

83 (EXHIBIT 2 FOR DEF'T—TRANSLATION.)

"SAN JUAN, P. R., *October* 19, 1898.

Don Francisco Martin, Ponce.

DEAR SIR: We have at hand your favor of the 10th instant, and in answer beg to state that just as soon as we are advised by the company of its resolution on the Coto Laurel matter we shall communicate the same to you for your guidance.

This is as much as we can tell you for the present, and in the meanwhile we repeat that we are,

Yours very truly, etc.,

(Signed) SOBRINOS DE ESQUIAGA."

(Copy.)

Q. Do you remember seeing Mr. Fritze present during this conversation?

Ans. Yes, there were several consuls there.

Q. Do you remember what day it was?

Ans. The same day the American troops landed in Ponce.

Q. Did you go to see General Wilson again upon the same subject?

Ans. No, sir.

Q. Did you not call again and ask for protection after that time?

Ans. No, sir.

Rebuttal.

(By Mr. BOERMAN:)

Q. To make it clear, you say when you went to see General Wilson that it was on the day the troops entered Ponce—was it then the 25th of July?

Aus. It was the day the American troops came in and the Spanish flag was hauled down.

Q. It was in the month of July, was it not?

Ans. I think that the landing in Guanica was made on the 24th of July, and it must have been the 25th, 26th or 27th when they came in here.

(Mr. Martin retires.)

84 HENRY C. FRITZE—Recalled.

(By Mr. DEXTER:)

Q. Do you remember having occasion to call on General Wilson in the summer of 1898 in company with other consuls?

Ans. Yes.

Q. About how long after the invasion was that?

Ans. I had occasion to see General Wilson almost daily for eight or ten days.

Q. Do you recollect when it was that you saw Mr. Martin, the plaintiff here?

Ans. I do not recollect the exact date, but I think it was during the first days that General Wilson was here.

Q. Do you know about when he arrived here?

Ans. He arrived on the 27th of July, 1898.

Q. And it was only a few days after that you saw Mr. Martin?

Ans. Yes, some time afterwards; I do not think it was the same day.

Q. State, if you know of your own knowledge, there was an invasion existing in and about Coto Laurel on the 19th day of August, 1898?

Ans. I remember that during the first weeks the American troops were here, there was a certain amount of——

Q. I speak now of invasion by foreign troops; if there was an invasion in Porto Rico and in the vicinity of Coto Laurel on the 19th day of August, 1898?

Ans. What do you mean by an invasion.

Q. I mean a military invasion?

Ans. A military occupation; of course there was.

Q. Of what nation was the invading army?

Ans. The American troops.

Q. With whom were these troops at war, if you know?

Ans. With Spain.

Q. Do you know, of your own knowledge, if there was an insurrection in or near the immediate vicinity of Coto Laurel on the 19th of August, 1898?

Ans. I could not call it an insurrection but there was a general state of insecurity.

Q. What about mobs and riots in and near Coto Laurel on the 19th of August, 1898?

Ans. I cannot precise the date; if you ask me whether there was a riot there on that day I cannot say; there has taken place disorder in Coto Laurel but I cannot remember the exact date, so if you ask me if it was on the 19th, I cannot say.

Q. What was the general condition in an- about that vicinity of Coto Laurel about that time?

Ans. Very insecure.

85 Q. By what reason?

Ans. On account of the Puerto Ricans.

Mr. BOERMAN: That is merely a matter of opinion.

Q. State whether things were normal?

Ans. They were absolutely unnormal; not at all normal.

Q. What are the facts upon which you base that statement?

Ans. There was a general state of disorder which prevailed after the landing of the American troops.

Q. In and about the vicinity of Coto?

Ans. I know perfectly well that during the first days or even the first weeks after the landing of the American troops there was a

great deal of disorder going on in and near the Coto, just the same as in the other parts.

The COURT: Was this on or about the 19th of August?

Ans. About three weeks had passed since the Americans came in, and I recollect perfectly well that an orderly state of affairs had not been re-established by that time.

Cross-examination.

(By Mr. BOERMAN:)

Q. When were you in the Coto before the fire and before the 19th of August?

Ans. It would be impossible for me to state at what time I went there.

Q. Were you, during the month of August, in the Coto?

Ans. I cannot say that; it is about four years now since then and I cannot recollect. I know I have not been there after the landing of the troops.

Q. So all that you have testified is hearsay?

Ans. Oh, yes.

Mr. BOERMAN: I now move the court, under the witnesse's statement, to strike out all of his testimony as to this matter as it is hearsay only.

The COURT: You will have to confine it to the actual conditions at the place where the insurance existed. The object of the provision is, of course, that the insured is not to suffer for any loss that occurs by reason of a riot at that place, or invasion at that place. If you prove there is a riot in *in* Ponce, it might not reach there and he might not be in any danger. I think the witness has to speak of his own knowledge.

The WITNESS: Will your honor allow me to say something? I want simply to state that in my character as German vice-consul I was, during the first days of the invasion, a great deal in the vicinity of the then authorities here, and while of course, I was not personally present at Coto I knew of the situation.

86 The COURT: Well, that is not competent.

Q. You are the general agent of several fire insurance companies, are you not?

Ans. I personally am not but my house is.

Q. Of about how many?

Ans. The general agency is in our house in San Juan and not here. We are the sub-agents of the houses of which our house in San Juan is the general agent.

Q. Of about how many?

Ans. Four or five; I do not know.

(Witness retires.)

And thereupon, the defendant, Royal Insurance Company, to further maintain the issues on its part called and produced as a witness MARIA BALBINA RODRIGUEZ, who being duly sworn, took the stand and testified as follows:

(MARIA BALBINA RODRIGUEZ) (for def.).

(By Mr. DEXTER:)

Q. Please state your name?
Ans. Maria Balbina Rodriguez.
Q. Where do you live?
Ans. Now in the Barrio Jacaguas.
Q. Where did you live in the month of August, 1898?
Ans. In Coto.
Q. Were you living there all of that month?
Ans. Yes, and I was living there previously.
Q. Do you remember the fire that took place there on the night of the 19th of August, 1898, when the house of Mr. Francisco Martin burned?
Ans. Yes.
Q. What was the condition in the Coto the night the house burned; were the people quiet, or was there any excitement going on?
Ans. When we went to bed there was not a great movement.
Q. After that what was the first you knew about the fire going on?
Ans. Between ten and eleven we heard a movement there.
Q. What was that movement?
Ans. Persons and patrols of people.
Q. What were they doing?
Ans. That I do not know; I kept inside the house.
Q. Were they quiet or noisy?
Ans. They were very noisy; there was a great movement.
87 Q. Do you know where these people came from?
Ans. No, sir.
Q. Were any estates fired, or people killed?

The COURT: Do not lead the witness.

Q. What noises did you hear that night?

Mr. BOERMAN: That is assuming that there were noises.
The COURT: Ask the question what occurred.

Q. What occurred?
Ans. At that moment we heard voices saying there was a fire at the house of Martin.
Q. Did you see any strange people in town?

Mr. BOERMAN: I object as it is immaterial and leading.
The COURT: Askn the question.

Q. Did you see any strange people in the barrio that night?
Ans. Yes.
Q. Many or few?

Ans. Many.

Q. What did they seem to be doing?

Ans. They were doing something bad because there were many of them.

The COURT: Strike that last answer out.

Q. Do you know of your own knowledge what was going on?

Ans. Yes; they were burning down the houses.

Q. Did you see any provisions or other property taken out of any of the houses; did you see them carry away anything or take anything away from the houses.

Mr. BOERMAN: I think that is leading.

The COURT: Ask her what if anything they did.

Q. What else did you see them doing?

Ans. I did not see them doing anything more but there was a fire.

Cross-examination:

Q. Did you see anybody setting fire to the house?

Ans. Not at night but in the day time.

Q. Then when you said that they were putting fire to the house it was only hearsay, was it not? When you testified they were burning the houses it was only from hearsay, was it not? You did not see anybody putting fire to the house did you?

Ans. When I heard it I got up and saw it. I heard voices saying that there was a fire at the house of Martin and as I was living so near to it, I got up.

88 Q. How long did you sleep when you went to bed that night; how many hours did you sleep?

Ans. We did not sleep any because we went to bed at 9 o'clock, and soon after that we heard the movement.

(Witness retires.)

And thereupon the defendant, Royal Insurance Company, to further maintain the issues on its part, called and produced as a witness JOSÉ LARIO ROCHE, who, being duly sworn, took the stand and testified as follows:

(JOSÉ LARIO ROCHE) (for def.)

(By Mr. DEXTER:)

Q. What is your name and occupation?

Ans. My name is José Lario Roche; I am the alcalde of the barrio, and when the man came to summons me he had the wrong summons, he had a summons for Ramon Roche.

The COURT: That is all right. Go on if this is the witness you wanted.

Q. Where did you live in the month of August, 1898?

Ans. In the barrio of the Coto.

Q. Were you there on the night of August 19, 1898?
Ans. I was in my store.
Q. What was your business at that time?
Ans. My business was having a little store a little lower down.
Q. What office did you hold there at that time?
Ans. I was the commissary of the barrio.
Q. Please state what happened on the night of the 19th of August 1898 when the house of Mr. Francisco Martin burned?
Ans. That night there came a cart-load of men from down below.
Q. Who were these men—what kind of people were they?
Ans. I did not know them.
Q. What did they do?
Ans. They fired an estate opposite my house and as I was the commissary of the barrio I told them not to break the peace in the place as we were in a state of war.
89 Q. Were these people officers or soldiers?
Ans. They were some individuals that were going there, and I went and told them not to fire.
Q. At whom were they firing?
Ans. At the air.
Q. Were they soldiers, or officers of the law?
Ans. As it was night and dark I could not see their clothes, but I saw them raise a flag, or at least they called it that.
Q. Did you see what flag that was?
Ans. I saw the flag, and it was a flag—an American flag but it was at night and you could not see well. They were people of the country though because they spoke Spanish well.
Q. What did they do then?
Ans. They went on and as they were armed I did not follow them.
Q. How long after that did the fire occur at Francisco Martin's house?
Ans. They were firing there for about half an hour, and then in order to find out who they were I called out to them. I followed the road and when I got as far as the house of Martin I saw it was on fire already and then I asked "Who set that house on fire?", and then the reply was a blow.
Q. Who struck the blow?
Ans. I could not find out who it was because immediately afterwards it was from a poniard and then I ran away home.
Q. Were these people then present there?
Ans. The people that came in the cart; I could not know who they were.
Q. Were these people residents of the town or strangers?
Ans. I had my eyes fixed on the fire and not on the persons.
Q. Were there many persons or few around there that night?
Ans. There were plenty.
Q. Was it an usual or unusual number of people gathered there?
Ans. There were about 16 or 20 or 30 in the barrio.

By the COURT:

Q. You mean the people who live in the barrio?
Ans. The barrio has a thousand and odd people.

(No cross-examination.)
(Witness retires.)

90 And thereupon the defendant, The Royal Insurance Company, to further maintain the issues on its part, called and introduced as a witness MANUEL PEÑAS ARRERO, who, being duly sworn, took the stand and testified as follows:

(MANUEL PEÑAS ARRERO) (for def.).

(By Mr. DEXTER:)

Q. What is your name and occupation or profession?
Ans. Manuel Peñas Arrero; I am a business man.
Q. Where were you living in the month of August, 1898?
Ans. In the Coto Laurel.
Q. Were you living there on August 19th?
Ans. No, I was here in town then.
Q. Were you in the coto the night of that day?
Ans. No, sir.
Q. When did you leave there for Ponce?
Ans. About eight or ten days previously.
Q. What was the occasion of your leaving there and coming to Ponce?

Mr. BOERMAN: I object to that as it is immaterial entirely.
The COURT: Let him state what he saw; he cannot give any private reasons for what he did.

Q. State, if you know, of any disorder by which you were compelled to leave Coto?

The COURT: That is leading.

Q. Why did you leave the Coto?
Ans. Because at that time there were bands of seven or eight who went around the place.
Q. Where were these bands operating?
Ans. They were moving about from place to place in the Coto.
Q. What did they do?
Ans. They came to my house--they were threatening Spaniards—and said that by order of General So and So we had to deliver to them all we had.
Q. Was anybody else compelled to leave the Coto at that time, if you know?
Ans. That I cannot tell.

91 Q. Was any property of yours destroyed about the 19th of August, 1898?
Ans. All that I had.

Q. How was it destroyed?
Ans. As I discovered the day after it was by fire.

The COURT: That is excluded from the testimony; what he heard.

Q. Do you know of your own knowledge how that property was lost?
Ans. I have said that I knew the next day that everything was burned up.
Q. Did you see the remains of it when you went back there the next day?

The COURT: I cannot go into that; it may have been burned in some other way.

Cross-examination:

Q. Is it not a fact that at that time the state of Porto Rico in all the barrios was the same as in Coto, just as well as in the other parts?

The COURT: That is not competent. I cannot go into the discussion of the condition of Porto Rico.

Q. Is it not a fact that the state of all the barrios in the vicinity was the same?
Ans. Yes, the same as this.
Q. And the state in Coto was not different from the state in any other barrio?
Ans. I did not leave the barrio except to come here to Ponce.

(Witness retires.)

92 And thereupon the defendant, The Royal Insurance Company, to further maintain the issues on its part, called and produced as a witness JOSÉ JULIAN LEON, who being duly sworn, took the stand and testified as follows:

(JOSÉ JULIAN LEON) (for def.)

(By Mr. DEXTER:)

Q. What is your name and business and where do you live?
Ans. José Julian Leon; I am a merchant and live in the Coto Laurel.
Q. Where did you live on the 19th of August, 1898?
Ans. In the same Coto Laurel.
Q. Were you there on the day and night of the 19th of August?
Ans. Yes, at home.
Q. Will you state what happened that night?
Ans. About midnight I heard a cry of "Fire!"
Q. Were there any strange people in the barrio that you saw?
Ans. No, sir the same as ever.
Q. Do you know how the house of Mr. Francisco Martin took fire?

Ans. No, I do not know; I was living at a short distance from him.

Q. What was the condition of the barrio that evening with reference to noise or excitement?

Ans. I did not hear any.

Q. Have you ever testified before about the circumstances of that night?

Mr. BOERMAN: I object to that; it is immaterial.

The COURT: He can prove he made other statements, and can impeach him by them.

Q. Have you ever testified upon any other occasion about the circumstances of that night?

Ans. I did declare, but it was to make known that when I heard the word "fire" I saw the house of Francisco Martin afire, and about the individuals who helped me to carry provisions out into the yard.

Q. Whose provisions do you refer to?

Ans. To my provisions in my own establishment.

Q. Why did you take those provisions out?

The COURT: That is objectionable.

Q. Was there anything happening around your house that gave you an alarm?

The COURT: If that was after the fire began I do not think I can go into that.

93 Q. Did you go into the house of Francisco Martin a short time before the fire?

Ans. No.

Q. Were you never in the house of Francisco Martin?

Ans. On that day no, but at several times before. I had been living there about fourteen years.

Q. What other times before that?

Ans. I dod not remember; I know I have been there other times.

Q. Do you know what kind of stock he carried?

Ans. Provisions and merchandise.

Q. Up to the time of the fire what amount, if any, do you know that he had?

Ans. I cannot say that.

Q. Do you know if a large quantity of goods were taken out by any people a few days before the fire? Do you know if any goods were taken out?

Ans. I do not know it.

Q. Can you state whether the amount of provisions and merchandise in the store at that time was large or small?

Ans. I cannot tell; I know it was a house that used to do a large business.

(No cross-examination.)

(Witness retires.)

Mr. Dexter, in behalf of the defendant, Royal Insurance Company, announced that the defendant here rested its case.

And thereupon, to further maintain the issues on his part and in rebuttal of the evidence offered by the defendant, the said plaintiff called and produced as a witness LUIS LOPEZ, who being duly sworn, took the stand and testified as follows:

(LUIS LOPEZ) for pl'ff in rebuttal.

(By Mr. BOERMAN:)

Q. What is your name?
Ans. Luis Lopez.
Q. Where do you reside?
Ans. In the Coto Laurel.
Q. What is your profession?
Ans. Carpenter.
94 Q. How long have you lived in the Coto Laurel?
Ans. From the year 1895.
Q. Have you been living there since the month of August, 1898?
Ans. Yes.
Q. Did you absent yourself at any time?
Ans. No, sir.
Q. Were you there during the whole month?
Ans. Yes, all the month
Q. State what was the condition of the Coto during that month so far as tranquil-ity was concerned?
Ans. At the beginning and when the troops passed through there was some uneasiness, but when they had passed everything was quiet again.
Q. When did the troops pass?
Ans. They passed through there at the beginning of the month and were in camp in the neighborhood.

Cross-examination:

Q. Do you not know it to be a fact that there was a number of inknown people who vis-ted the barrio of Coto very frequently during the month of August, stealing and threatening people?
Ans. No, sir.
Q. You never saw anything of that kind?
Ans. Nobody threatened me, nor did I see anybody being threatened.
Q. What was your business during the month of August?
Ans. I was employed there in a store.
Q. By whom?
Ans. By the Sucesion de Cerellez.
Q. Where?
Ans. In the Hacienda "Ponceña." I was living in Coto.
Q. Did you see the fire that night of the 19th of August when the house of Francisco Martin was burned?

Ans. When I arrived there, it was already burned down but still burning.

Q. Where did you come from at that time?

Ans. I was sleeping there at Coto.

(Witness retires.)

95 And thereupon to further maintain the issues on his part, and in rebuttal of the evidence offered by the defendant, the said plaintiff called and produced as a witness one MIGUEL MONTENEGRO, who being duly sworn, took the stand and testified as follows:

(MIGUEL MONTENEGRO) in rebuttal.

(By Mr. BOERMAN:)

Q. State your name?

Ans. Miguel Montenegro.

Q. What is your occupation?

Ans. Laborer.

Q. Where do you work now?

Ans. I am employed now at the house od Don Eugenio Morales here in Ponce.

Q. How long have you lived in Ponce?

Ans. Eight months.

Q. Where did you live before you came to Ponce?

Ans. In the Coto Laurel.

Q. How many years did you live there?

Ans. Four years.

Q. Did you live there during the month of August, 1898—during the invasion?

Ans. Yes.

Q. Did you live there during the whole month?

Ans. Yes.

Q. Tell what was the condition of the Coto so far as tranquil-ity was concerned during that month?

Ans. The whole month was tranquil.

Q. Did you see any disturbance, or anything committed there?

The Court: He says it was tranquil.

Cross-examination:

Q. And during all the month of August you never heard the cry of "Fire" in the Coto?

Ans. No, sir, until the 29th of August, at night, the next day I heard some shouts; it was from 10 o'clock on.

Q. What day was it that the house of Francisco Martin burned?

Ans. The 29th, or the morning of the 20th.

Q. Was that the morning that you heard the shouts of "Fire," the morning or the night that the house of Francisco Martin burned?

Ans. No, sir; the next day at 10 o'clock, between 10 and 11.

Q. How do you know it was the night of the 29th?

Mr. BOERMAN: I think he said the 20th.

Q. How do you know that it was the night of the 20th that that fire took place?

96 Ans. Let me tell you now: I am out of my way: it was on the 19th and the 20th.

Q. Where were you that night?

Ans. Sleeping at home.

Q. Where is your home?

Ans. About two cuerdas from the house of Pancho Martin.

Q. Were you working for Don Pancho then?

Ans. No, sir; I was working for the hacienda.

Q. Do you know whether any people took away any provisions from the store of Don Pancho any night before that?

Ans. I do not know; I cannot say.

Q. Do you know of your own knowledge whether provisions were taken away from his place.

Ans. No, sir; I do not remember; I saw nothing of that.

Q. You say there was no riot or commotion at all there at that time?

Ans. No, sir.

(Witness retires.)

Mr. Boerman on behalf of the plaintiff here announced that the plaintiff closes his rebuttal.

The interpreter having finished the translation of the will of Francisco Martin, which was offered in evidence in the beginning of the trial, and which was ordered by the court to be re-translated, at which time it would be admitted in evidence (see page 2 of this record) the plaintiff, to maintain the issues on his part, offered and introduced said will and translation into evidence, which translation, literally copied, is in words and figures as follows, to wit:

"*Nuncapative Will.*

No. 543.

In the city of Ponce, island of Porto Rico, on the 10th of October, 1898, before me Lawyer Rosendo Matienzo Cintron, notary of the illustrious college of this province, with residence and open office in this city, and before the witnesses which had been asked and called for this act, and who shall be named at the end, there appear:

Don Francisco Martin y Llorenzo, married, of this vicinity, property owner, sixty five years of age, whom I know and I certify to his profession and residence; being in his house located in Comercio street of this town, number 21, where I have repaired in virtue of an express request on account of the appearer being sick in bed, but in his entire and perfect senses, and whom therefor- I consider to be

in his legal capacity necessary to make a will, after his showing his personal pass-port of the sixth class number 235 issued on the 5th of September last by the collector of taxes of this city, and after being assured by the witness- that they know the testator, and
97 that they also consider him with capacity sufficient for this execution of a will, the same states:

That being desirous to formalize his last will he executes his present open will in the form contained in the following clauses:

1.

He declares that he was born in the town of Notaez, province of Granada, Spain, in which parish he was baptized; that he is the legitimate son of the legitimate matrimony of Francisco Martin y Romero and Luisa Lorenzo, who were born in said town but who are now dead, and that he professes the Catholic and apostolic religeon.

2.

That after his death his body must be buried in the Catholic cemetery of the parish where his death occurs, with the exequies and suffrages for the repose of his soul, as shall be directed by his widow and eldest son, Francisco Ruperto.

3.

He declares that he is at present married to Guadelupe Vasquez y Alvarado, from which matrimony he has had and reared six children, named Francisco Ruperto, 27 years of age, Encarnacion, 24; Arturo, 22; María Inés 20; Juan, 18; Francisca, 16, all of whom are unmarried and living in the city.

4.

He declares likewise that if at the date when this will has to take effect there be established or subsisting any compulsory legacies in favor of beneficent institutions, or for other pious objects, he leaves to them and for once only, what corresponds to them by law.

5.

He also declares it not being possible for him at this moment to make an exact account of his property, he confides or entrusts this duty to his spouse and executor to be named hereafter, who, on account of their perfect knowledge of all his goods shall detail them in due time with due accuracy.

6.

The debts for or against which the testator has pending collection or payment at the time of his death, it is his will that they be declared in due time by his spouse and executor in as much as they have a perfect knowledge of the state of business of the grantor.

7.

The testator makes known that neither he nor his spouse brought anything to the marriage fund when they contracted matrimony; therefore, all the property which may be in existence as belonging to them after his death must be considered as *bienes gananciales*.

8.

He appoints as his testamentary and faithful executor of his will his eldest son, who is of age, Francisco Ruperto Martin y Vasquez, upon whom he confers the most ample and solemn power in order that when the death of the testator occurs he may proceed to execute this will in all its parts, for which object he grants to him the legal time, and it is his will that it be extended to the time required.

98

9.

He elects and appoints as his private accountant his friend, Justo Barros y Soler, with the special charge to carry out the operations of inventory, appraisement, liquidation, division and adjudication of the goods and property found or existant at the death of the testator, extra-judicially for the sake of saving expense; although he must immediately submit said operations to the approbation of the courts if there be then some of the heirs who are minors.

10.

The testator by these presents institutes and appoints as his only and universal heirs of all his property his said son, Francisco Ruperto, Encarnacion, Arturo, María Inés, Juan and Francisca Martin y Vasquez, in order that those who may exist may enjoy and relish it in equal parts, with the blessing of the Almighty and his own, without prejudice to the usufructory quota to which the spouse of the tes-ator has a right according to the provisions of article 834 of the Civil Code.

11.

And lastly, the testator revokes, annuls and cancels every will or testament which he may have granted in any form before the present one, which is the only one he wants to be kept, fulfilled and executed as his last and deliberate will in the most legal and solemn form established by law.

Thus he grants it in the presence of the witnesses residing in this city, who are of age and known to me, and who are without legal blemish, to wit: Eduardo Salich y Simonpietri, Federico Mórin de Jesús, and Juan Menchaca y Lugo. And after being duly informed of the right which the law concedes to all of them to read this will by themselves, which right they renounced, I proceeded, in accordance with their wish, to read it wholly to them, the contents of which is ratified by the tes-ator who signs with the witnesses in a sole act at four p. m., and I certify to the whole contents of this will,

as well as to the fact that all the formalities described in the civil code now in force in this province have been complied with. The above is certified to *my by eht* undersigned notary of the illustrious college of this province.

(Signed) FRANCISCO MARTIN.
EDUARDO SALICH.
FEDERICO MORIN.
JUAN MENCHACA Y LUGO.

(Signed, signeted and rubricated by)
Lawyer ROSENDO MATIENZO CINTRON.

*Notes.*

On the 13th of January, 1902, as a substitute for the principal I issued a first copy to the heir, Francisco Ruperto Martin y Vasquez in three sheets of common paper, to which I certify.

(Signed) ACOSTA. [RUBRIC.]

On the 8th of March, 1902, as a substitute of the principal, I issued a copy of this will to Antonio Catinchi y Crusalvi, in three sheets of common paper, to which I certify.

(Signed) ACOSTA. [RUBRIC.]

99 It corresponds faithfully with its original under the number 543 found in the protocol of public instruments of the referred to year of the office of this *notaray*, which is at present under my charge, because the proprietary notary is absent on leave.

In witness whereof, and at the request of the heir, Francisco Ruperto Martin, I issue this second (for him) copy, to which I put a flourish, signet and sign in three sheets of common paper at Ponce on the 12th day of May, 1902.

(Signed, signeted, rubricated) ÁNGEL ACOSTA.

(There is a fifty cent revenue stamp cancelled by the notary's seal.)

The foregoing is a true and faithful translation of its original in Spanish: to which I certify.

(Signed) Z. VALL SPINOSA,
*Interpreter, U. S. Dist. Court for Porto Rico.*"

Mr. DEXTER: The defendant now offers in evidence the record of the court martial proceedings held in the city of Ponce, September 8th, 1898.

Mr. BOERMAN: I object to the introduction of this document because it contains the finding of a military commission, and not of a court, and 2nd: because it is not a certified copy of any judgment.

The COURT: Under what view do you think that is competent?

Mr. DEXTER: It is to show that there were parties accused of this very crime.

The COURT: I do not think it is competent; I do not know of

any rule of law by which a proceeding of a court-martial is competent in a court. I sustain the objection to it.

Mr. DEXTER: Please save an exception for the defendant to the ruling.

And thereupon, after argument by the attorneys for the plaintiff and for the defendant, the court charged the jury as follows, to wit:

100 RUPERTO MARTIN, Executor of the Will of Francisco Martin, Deceased, *vs.* THE ROYAL FIRE INSURANCE COMPANY. } Tried in Ponce at the May Term of the Court, May 19th & 20th, 1902.

*Charge of the Court.*

GENTLEMEN OF THE JURY: As you have already learned during the progress of this case, this is an action upon a fire insurance policy, issued by the Royal Fire and Life Insurance Company to Francisco Martin, for loss by fire of the property insured. The defendant first puts in issue by its answer the question whether there was any insurance, it being shown that the policy was lost. It is for you to determine from the testimony whether that insurance existed. The defendant, upon notice from the plaintiff, has produced a form of the insurance. It is before you as testimony. The evidence tends to show that this insurance upon the property that was burned was first taken out on the 12th of March 1877, for one year; that it was renewed from year to year and that the last renewal was on the 12th of March 1898 to the 12th of March 1899. The testimony tends to show that the property was burnt on the 19th and 20th of August, 1898. There is testimony showing that the insured died in October, 1899, and this action is brought by his executor to recover the amount lost by reason of that fire on the policy of insurance.

You are first to find then from the testimony—because it is your province to judge of what is proven in the case—whether that insurance existed, or not. If that insurance did exist, and this property during the period covered by it was destroyed by fire, then, unless the insured had failed in some way to comply with some condition in the policy required upon his part to be complied with, the plaintiff is entitled to recover the loss that accrued by reason
101 of that fire. It is your duty to accept the law, not as stated to you by counsel, however eminent in the profession they may be, but as given you by the court. Even though that statement of law may be erroneous, you must accept it as the law of the case. It is your province, however, to judge and determine what is proven in the case from the testimony. I will not detail it to you, gentlemen, as you have listened carefully to all of it.

You cannot consider, if you should find in favor of the plaintiff, any loss of any property not covered by the policy of insurance, except as I will presently say to you in reference to the stock of goods that it is claimed was insured.

So far as the real-estate was concerned, the insurance was upon a building built of timber and roofed with galvanized iron, situated in the barrio of Coto, in the district of Ponce, and occupied partly as a dwelling and partly as a shop. You are confined, in your consideration of this case, to that real-estate. If a new building was built or added to the building that was insured, you cannot consider any loss of the new building, and you can only consider the loss arising from the destruction of the real-estate that in point of fact was insured. The insurance also covered a stock of goods, or, it is claimed it covered the stock of goods in the store-house. If you find from the evidence that that insurance existed, I say to you as a matter of law that the insured had the right to sell and re-purchase, by way of substitution, a stock of goods, and that a policy upon a stock of goods, as a matter of law, covers afterward acquired and substituted goods. This is necessary from the nature of the business. No one would insure a stock of goods unless he had the privilege to sell and rebuy, and hence this insurance, if it existed, covered the stock of goods in that store at the time of the fire.

102 If you find for the plaintiff in this case you would find the damage that accrued by reason of the destruction by fire of the real-estate as it existed, and its value at the time of the fire as covered by the policy of insurance; as to the goods, you would find the loss that resulted by reason of the destruction by fire of the stock of goods on hand and embraced in this policy of insurance at the time of the fire, consisting of provisions and groceries, that was insured. Whatever was on hand that may have been substituted of that stock of groceries and provisions at the time of this fire, you would find the value in damages by reason of its loss. There is testimony tending to show what the value of that property was in pesos. As a matter of law a peso is worth sixty cents, so that in estimating what the value of that property was in pesos—as your verdict must be, if you find for the plaintiff, in dollars and cents—you will estimate, in considering the testimony as to pesos, you will estimate it at sixty cents American money to the peso.

The defendant has not only presented the defense that it never promised and never insured this property, as claimed in the declaration, but that after the fire there was a release of all claim for damages by reason of the loss of the property by the fire. There is no proof, no evidence, as I recollect it, of any agreement. There are certain circumstances that were allowed to be proven in the case, and if from these circumstances, from the evidence, you believe there was a settlement of this matter by the insured after the destruction of the property, upon a sufficient consideration, you would find for the defendant. Otherwise, so far as that defence is concerned, you would find for the plaintiff.

Another defense presented in this case is that the stock was removed from the store without permission. There is no evi-

103 dence as to it.

Another defense is that there was no notice given to the company—the underwriters—of this loss within fifteen days, as pro-

vided in one of the conditions of the policy, and that no proof was furnished to the company of the loss and no notice within fifteen days. It is shown in the testimony that this was a total loss of the property. There is no dispute in reference to that. It was a reasonable condition, and as such binding upon the insured, that he should notify the company, in writing of this loss and that he should furnish proofs of it. That was a reasonable condition and binding upon the party. That condition, however, in the policy was for the benefit of the insurer—for the benefit of the company. Now, the company had the right to waive this condition if it saw fit to do so. It could do so either by an express agreement or by conduct in reference to it. The testimony tends to show that it had a local agent in Ponce, near where this fire occurred. The testimony tends to show that it had a general agent for its business in Porto Rico in San Juan. The testimony tends to show that when the insured reported this loss verbally to the local agent, he referred the insured to the general agent in San Juan. A resident general agent, gentlemen, of a foreign insurance company, with general charge of its business and the right to manage its business generally in the district where he resides, has the power in law to waive the conditions in a policy as to notice of the loss, or as to the presentation of proofs as to the loss. He may waive it by conduct, as by the payment of what he thinks should be paid on account of that loss. That is a waiver of any production of proof as to the loss or of any
104 notice, and if a general agent has that power and acts upon an oral notice from the party that the loss has occurred in such a way as to induce that insured party to believe reasonably that no other notice is required of the loss, and that no other proofs are required, then that, in law, is a waiver of that notice or of proofs. As a matter of law, when this general agent was applied to and told of this loss, and was informed that it was a total loss, if you believe from the testimony that he informed the insured that he would report it to the company and would notify him if they determined to pay, and no further notice was required by him, or any proofs of loss were required by him except being informed that it was a total loss of the property, that, in law, was a waiver of the production by the insured to the general agent of the company of proofs of the amount of that loss.

If you believe from the testimony that the company by their general agent induced the insured—reasonably induced him, that is, that the conduct was such that a man of ordinary intelligence would reasonably infer from it—that no other notice or proofs were required, then it was a waiver of any other proofs or notice. If, for instance, the company, being notified orally of the destruction of the property, if they refused to pay any loss upon a totally different ground than that of no proofs of loss being presented to them, then that was a waiver, in law, of any proofs of loss being presented.

Another defense presented is that the property passed by mortgage or transfer without the consent of the company. I have no recollection of any testimony on that point.

Another defense presented by the answer is that the loss was caused by invasion, or occurred during invasion, war, riot, etc. I will read to you a part of the condition of the policy relative to this matter, although the entire policy and all its conditions is
105 before you as testimony. It provides, "This policy does not cover loss or damage by fire happening during any invasion by foreign enemy, during rebellion, insurrection, riot, civil commotion, military or usurped power or martial law within the country or locality within which the property insured is situated, unless proof be made to the satisfaction of the directors that such loss or damage was not occasioned by or connected with, or occurred from a cause or causes independent of the existence of such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law."

The defense mainly relied upon here is that this loss occurred during an invasion, riot, civil commotion, military or usurped power, or martial law. A fair construction of that condition in the opinion of the court is that that must, in order to excuse this company from liability in case of loss of property by fire, that that invasion by foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law, must have been occurring within the section of the country where this loss occurred, or within the locality, and within such a radius of country where the loss occurred that danger arose to property by reason of the existence of that rebellion, invasion, insurrection, civil commotion, military or usurped power, or martial law. And I further tell you, gentlemen, that if you believe from the evidence that this destruction of this property did not occur from any of these causes, and occurred from a cause independent of the existence of any foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law, then you should find so far as this defense is concerned for the plaintiff in damages whatever you think may have been his loss. This is a reasonable construction, as the court thinks, of this and these conditions of the policy.

106 A civil case like this one, is unlike a criminal case. You act *upon* what you believe from the facts, from the testimony,—you act upon a preponderance of the testimony in the case. If you believe from the testimony that this insurance existed upon the property named in this form of policy which is produced to you, and if you believe from the evidence that the real-estate, the property named in the policy, was destroyed by fire, and if you believe that the stock of goods, although it may have been changed in the course of trade by substitution,—if the stock of goods on hand at the time of the fire was destroyed by the fire, then you would find for the plaintiff in damages the reasonable value of that real-estate that was insured and of that stock of goods that was insured and that was on hand—the existing stock, the substituted stock—if it had been substituted to any extent—at the time of the fire, provided, however, if you believe from the testimony, gentlemen, that the plaintiff failed to give written notice to the company of this destruc-

tion of the property, or to furnish proofs within the time named in the policy of the loss of the property, and that there was no waiver either by agreement or by conduct upon the part of the company, or its general agent, of further notice or of the production of proofs of loss, then you will find for the defendant; and further, gentlemen, if you believe from the testimony that this loss occurred during invasion, rebellion, riot, civil commotion, and other states of case as set out in the policy existing in this locality where this store and real-estate was located, or in that section of the country, and that it occurred by reason of the existence of that state of case, why then, if you believe it did occur from that state of case in that section where the loss occurred and by reason of it, you would find for the defendant.

107 Your verdict should be, if for the plaintiff, "We, the jury find for the plaintiff," so much in damages, not exceeding the amount claimed in the declaration, which, I believe, is twenty thousand dollars, and not exceeding the amount insured upon the property, and not exceeding also the amount of loss by the defendant. If you find for the defendant your verdict is simply: "We, the jury, find for the defendant."

If you should find for the plaintiff, gentlemen, you may or not, in your discretion, count interest upon the amount of this loss, if you find that the property had been insured, as I have indicated, estimating the interest at the legal rate of six per cent. you may allow interest at that rate upon whatever amount you may find was the loss from the time when the defendant refused to pay anything on account of that loss. Or, you may, gentlemen, in your discretion only find interest from the time when this suit was brought. That is a matter in your discretion. You may not find any interest at all but merely find so much in damages.

Gentlemen (addressing the attorneys) is there anything further you wish me to say?

Mr. DEXTER (of counsel for defendant): Defendant excepts to that part of the court's charge wherein it was stated that the jury might find for the plaintiff, and the plaintiff was entitled to recover unless the insured failed to comply with some condition precedent. The defendant thinks that is limiting the conditions to conditions precedent.

The COURT: I will amend that by making it "some condition in the policy."

Mr. DEXTER: Defendant excepts to each and all parts of the charge whereby the court undertook to charge the jury that

108 they might find in excess of the face value of the policy.

The COURT: I did not do that. It cannot exceed the amount insured. There is nothing in the charge of that kind.

Mr. DEXTER: I thought I heard your honor say "not to exceed twenty thousand dollars"?

The COURT: Yes, and the other was connected with it: "Not to exceed the amount of twenty thousand dollars, and not to exceed the amount of insurance on the property." I coupled that with it.

I also coupled with it, "the actual loss that occurred." (Addressing the jury) You are limited to the actual loss that occurred and also limited to the actual insurance on the property, not exceeding, in any event, twenty thousand dollars.

Mr. DEXTER: I would like to ask the positive charge of the court that there could be, under no circumstances, a verdict for more than the face value of this policy, which is £1600.

The COURT: I think that is already in the charge.

Mr. DEXTER: Defendant also desires to except to that part of your honor's charge where it is stated that it was reasonable that defendant should furnish proofs of loss, and because the charge does not specify the time limit in accordance with the conditions of the policy, which was fifteen days.

The COURT: I think that was stated in the charge. I am very sure that in the charge I mentioned the fifteen days required in the policy.

109 Mr. DEXTER: With reference to that part of your honor's charge to the effect that a resident general agent of a foreign insurance company has power, in law, to waive conditions as to loss or presentation of proofs, the defendant excepts—1st: by reason of the statement of law therein, and 2nd: under the testimony in this case, that by a letter which was offered in evidence.

The COURT: You can only say that you desire to except to that part of the charge. Do not detail the testimony.

Mr. DEXTER: I except to it then.

The COURT: I over-rule the exception.

Mr. DEXTER: Also to that part of your honor's charge to the effect: "If he gives"—referring, as I understand it, to the agent—"if he gives the insured to understand that the loss will not be paid, that is a waiver of proof." We ask that be modified to: "unless the refusal was given before the fifteen days expired."

The COURT: That I over-rule,—but my statement, as I recollect it was that "unless there was a refusal to pay the insurance upon some other ground, than lack of proof of loss."

Mr. DEXTER: Defendant would ask the court charge that that condition would be binding as to furnishing proofs of loss within the fifteen days and would preclude the plaintiff from recovery if the proofs of loss were not furnished within that time.

The COURT: I will over-rule that.

110 Mr. DEXTER: Please save an exception.

Mr. DEXTER: Defendant also excepts to that part of the charge which states substantially as follows: "A fair consideration of the condition—(referring to the condition of the policy which is contained, I think, in part 3, referring to the invasion, riot, etc.) is, in order to excuse from liability, that the invasion (and repeating the other words in that connection) that the invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law must have been occurring in the section of the country or the locality where the fire occurred, and within such a radius of country that danger arose by the existence of such inva-

sion," and naming the other circumstances referred to in the policy.

The COURT: I over-rule that.

(Mr. Dexter takes an exception.)

Mr. DEXTER: Defendant also wishes to except to that part of the charge of the court to the effect that "if you believe that the loss did not occur from these causes." The objection being that defendant asks that the charge instruct the jury that they shall find for the defendant if they find that the loss occurred during the existence of any of these conditions——

The COURT: This cause or any of them.

Mr. DEXTER: Defendant asks that the charge be modified to this effect: "If you believe that the loss occurred during the existence of invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law then you will find for the defendant." In other words, not making that the cause, but if it is shown that those circumstances existed that then——

The COURT: The objection you make is, if that is modified as you wish—but it does not fix any locality or section of the country.

111 Mr. DEXTER: Your honor has already passed on that in this prior objection, but I refer now to the other feature as to whether the fire should prove to be the result of any of these conditions mentioned which would be the cause. We object to making——

The COURT: I have told the jury that if the fire arose by reason of any of these causes existing in that section or locality of the country.

Mr. DEXTER: That is the part defendant excepts to.

The COURT: You may take an exception to that. I understand you are claiming, for instance, if the Germans had invaded San Juan and got into San Juan, and if this property in this place had been destroyed by a boy dropping a match, that the company would be released. The court has not that view.

Mr. DEXTER: We also except to that part of the charge as to the proof of the loss.

The COURT: Well, save an exception.

Mr. DEXTER: I failed to hear any reference to the alienation of the stock. The defendant would ask the court to charge that if the jury believes from the evidence that if at the time of the fire or prior thereto the title to the stock of goods which had been insured had passed out of Francisco Martin and into another person or other persons, the plaintiff herein could not recover.

The COURT: That I could not give because the testimony does not support it. There is no testimony that there has been an
112 alienation to anybody else. If to a partner, however, the partner has an interest in the entire stock of goods insured.

Mr. DEXTER: We simply ask for a modification of the charge to state that if there was an alienation.

The COURT: I do not think there was any testimony to support the statement that there was any alienation.

Mr. DEXTER: Defendant makes that request upon the testimony of the witness——

The COURT: Do not state the testimony. Save an exception. Gentlemen of the jury, retire and make a verdict.

*Note.*

(The jury retired and shortly after returned and requested that certain parts of the charge of the court be read to them, whereupon the court ordered the stenographer to read the whole charge which he did up to the point where the defendant's counsel began the statement of his exceptions. Mr. Dexter, counsel for defendant, then requested that his exceptions to the charge and requests for modifications be read, and thereupon the court ordered that certain parts thereof, including only the parts showing the modifications of the charge be read and that requests of counsel and their exceptions be omitted, which was done. The main body of the charge as it appears above is the charge made to the jury including the modifications and changes which were written in at their proper places at the time they were made.)

113 And thereupon, on the same day, after the jury had retired and had agreed upon their verdict, they returned the same into court, which verdict being read by the clerk of the court was as follows:

"We, the jury, find for the plaintiff in damages the sum of seven thousand six hundred and twenty three dollars ($7623.00).

FRANCISCO B. BASORA, *Foreman.*"

And thereupon the defendant, by its counsel, asked the court to instruct the jury to return to their jury-room and make a separate finding of the damages separately upon the building and the stock of goods, which request the court refused, and to which ruling of the court the defendant then and there excepted.

114 I, H. P. Leake, do hereby certify that I am the official stenographer of the district court of the United States for Porto Rico and that I acted as such in the trial of the above entitled cause; that the foregoing transcript of the testimony numbered from pages 1 to 64 inclusive, is a true, full and complete report of all the evidence in said cause and contains, with the exhibits, records and documentary evidence therein referred to and identified, all of the evidence offered, given or introduced in the said cause by the respective parties upon the trial thereof; all of the objections and motions of the said parties thereto, or any part thereof; all of the rulings of the court to such objections and motions, and all exceptions of the parties to such rulings, as well as the charge of the court

to the jury, the objections thereto, the rulings of the court on such objections and the exceptions to such rulings.

Signed this 19th day of June, 1902.

H P. LEAKE,
*Official Stenographer United States District Court for Porto Rico.*

115 I, William H. Holt, do hereby certify that I am the judge before whom the above entitled cause was tried; that H. P. Leake was the official stenographer of the court who reported said cause; that the annexed and foregoing short-hand report of the evidence, duly certified to by the said official stenographer, is the report of the evidence in said cause and contains, with the records, exhibits, and documentary evidence therein referred to and identified, all of the evidence offered, given or introduced in said cause by the respective parties upon the trial thereof; all objections and motions of the said parties thereto, or any part thereof, and all rulings of the court upon such objections and motion, and all exceptions to such rulings, as well as the charge of the court to the jury, the objections thereto, the rulings thereon and the exceptions to said rulings; the said report with this certificate is ordered to be filed and made a part of the record in said cause.

Signed this 20th day of June, 1902.

WM. H. HOLT,
*Judge United States District Court for Porto Rico.*

116 I, William H. Holt, judge of the district court of the United States for Porto Rico, before whom the above entitled cause was tried, certify that the above and foregoing long-hand transcript certified to by the official stenographer of this court in the trial of said cause, contains all the evidence offered, given or introduced in said cause; all the objections and motions thereto, and all the rulings of the court to such objections and motions, and all of the exceptions to such rulings; and the charge of the court to the jury the objections thereto, the rulings of the court to such objections and the exceptions to such rulings, and the same is ordered to be certified to as a part of the record of this cause.

And the said defendant, Royal Insurance Company, on the 20th day of June, 1902, and within the time allowed by the court, thereafter tendered this, its bill of exceptions, it having been reduced to writing and all of the exceptions taken by the defendant during the progress of said trial being embraced therein, praying that the same be signed, sealed and made a part of the record of this cause, which is accordingly done this 20th day of June, 1902, *nunc pro tunc*, as of the 19th day of May, 1902.

WM. H. HOLT,
*Judge of the District Court of the United States for Porto Rico.*

[SEAL.]

117 In the District Court of the United States for Porto Rico.

I, Ricardo Nadal, clerk of the district court of the United States for Porto Rico, hereby certify that the above and foregoing transcript, containing 116 pages from 1 to 116 inclusive, is a true and correct transcript of the record and of all pleadings, documents, exhibits, papers, orders, judgment, proceeding and evidence as contained in the bill of exceptions, had or conducted in the foregoing case wherein Ruperto Martin, executor of the will of Francisco Martin, deceased, is plaintiff, and The Royal Insurance Company, defendant, as the same remains upon the files and of record in the said court.

In witness whereof, I have hereunto set my hand officially and affixed the seal of said court at the city of San Juan, Porto Rico, in said district this 28th day of June, 1902.

[Seal United States District Court for the District of Porto Rico.]

RICARDO NADAL,
*Clerk U. S. District Court of Porto Rico.*

Endorsed on cover: File No. 18,606. Porto Rico D. C. U. S. Term No. 86. The Royal Insurance Company, plaintiff in error, vs. Ruperto Martin, as executor of the will of Francisco Martin, deceased. Filed July 12, 1902.

FILE COPY. 9085

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JAMES H. McKENNEY,
Clerk.

# the Supreme Court of the United States

OCTOBER TERM, 1903

No. 86

THE ROYAL INSURANCE COMPANY
*Plaintiff in Error*

*vs.*

RUPERTO MARTIN, AS EXECUTOR OF THE WILL OF FRANCISCO MARTIN, DECEASED

## BRIEF FOR PLAINTIFF IN ERROR

WM. G. CHOATE
*Of Counsel for Plaintiff in Error*

EVENING POST JOB PRINTING HOUSE, NEW YORK.

# Supreme Court of the United States.

**No. 86.**

THE ROYAL INSURANCE COMPANY,
Plaintiff in Error,

v.

RUPERTO MARTIN, as Executor of the Will of Francisco Martin, deceased.

## BRIEF FOR THE PLAINTIFF IN ERROR.

### Statement.

This is a writ of error to the District Court of the United States for the District of Porto Rico. The action is assumpsit on a policy of insurance. The original plaintiffs were the widow, executor and heirs of Francisco Martin (Record, p. 1). Upon demurrer to the complaint on the ground of an improper joinder of parties (Rec., p. 10), the Court sustained the demurrer, holding that the executor was the only proper party (Record, pp. 11, 12). Thereupon the plaintiff amended, striking out all the parties plaintiff except Ruperto Martin, executor (Rec., p. 12). The declaration was that on or about January 1, 1898, the defendant made and renewed its policy of insurance and delivered the same to the late Francisco Martin and in consideration of a certain sum of money paid by

said Martin insured him against loss or damage by fire to the amount of £1,600 sterling on a building built of wood and covered with metal, situated at Coto Laurel, District of Ponce, Porto Rico, and also upon goods, chattels, merchandise and provisions in said building kept and contained (Rec., p. 2).

The policy contained, among others, the following clauses:

"3. This policy does not cover * * * loss or "damage by fire happening during the existence of "any invasion, foreign enemy, rebellion, insurrec- "tion, riot, civil commotion, military or usurped "power, or martial law within the country or local- "ity in which the property insured is situated, un- "less proof be made to the satisfaction of the di- "rectors that such loss or damage was not occa- "sioned by or connected with, but occurred from a "cause or causes independent of the existence of "such invasion, foreign enemy, rebellion, insurrec- "tion, riot, civil commotion, military or usurped "power or martial law" (Record, p. 33).

* * * * * *

"5. This policy ceases to be in force as to any "property hereby insured which shall pass from the "insured to any other person otherwise than by "due operation of law, unless notice thereof be "given to the company, and the subsistence of the "insurance in favor of such other person be de- "clared by a memorandum endorsed hereon by or "on behalf of the company (Record, p. 34).

The declaration alleged that the fire occurred on or about August 20, 1898, and that said property was consumed and destroyed by fire, whereby the said Francisco Martin, and thereafter his legal representatives sustained loss and damage to the amount of the sum insured, "which said loss and damage did not "happen by means of an invasion, insurrection, "riot or civil commotion, or of any military or "usurped power" (Record, p. 6); that the defendant

has not even considered the claim of the plaintiff but has refused to pay anything whatsoever on account of said loss (Record, p. 7); that Francisco Martin died October 25, 1900, and the plaintiff is the executor of his last will and testament (Record, p. 7).

The defendant pleaded among other things the following:

FIRST.—The general issue: "That it never promised in manner and form as in said declaration alleged * * *

"FOURTH.—* * * That plaintiff ought not to have his said action because the alleged loss or damage was caused by fire happening during the existence of an invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military and usurped power and martial law, within Porto Rico and in the locality in which the property alleged to have been insured was situated and that no proof was made to the satisfaction of the directors that such loss or damage as alleged was not occasioned by or connected with, but occurred from a cause or causes independent of the existence of such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law (Record, p. 13).

"SEVENTH.—That plaintiff ought not to have or recover herein for the reason that plaintiff has no interest in or right to recover because of the transfer and mortgage of said premises, and the foreclosure thereof" (Record, p. 14).

Issue was joined by replication on the first, fourth and seventh pleas (Record, p. 15).

The case was tried with a jury, who returned a verdict for $7,623 (Record, p. 17), for which sum judgment was entered on May 20, 1902, with interest thereafter at 12 per cent. per annum and costs (Record, p. 17).

A motion for a new trial and also a motion in

arrest of judgment were made, both of which were overruled (Record, pp. 17 to 20).

There is no question made of the jurisdiction of the Court below. The action was brought by a plaintiff who is alleged in the declaration to be a citizen of Porto Rico and resident of Ponce against the Royal Insurance Company, a corporation organized under the laws of England and having an office and doing business in the Island of Porto Rico (Record, p. 1).

By the act establishing the government of Porto Rico (31 Stat., Chap. 191, Sec. 34) passed April 12, 1900, it was provided that "Porto Rico shall con- "stitute a judicial district, to be called the District "of Porto Rico. The President by and with the ad- "vice of the Senate shall appoint a district Judge for "the term of four years unless sooner removed by "the President. The District Court for said district "shall be called the District Court of the United States "for Porto Rico * * * and shall have, in addi- "tion to the ordinary jurisdiction of district courts "of the United States, jurisdiction of all cases cog- "nizant in the Circuit Court of the United States, "and shall proceed therein in the same manner as a "Circuit Court."

By Chapter 812, Sec. 3, passed March 2, 1901, amending the foregoing act, it was provided, that "the jurisdiction of the District Court of the United "States for Porto Rico in civil cases shall, in addi- "tion to that conferred by the act of April 12, 1900, "extend to and embrace controversies where the "parties or either of them are citizens of the United "States or citizens or subjects of a foreign state or "states wherein the matter in dispute exceeds ex- "clusive of interest or costs the sum or value of "$1,000."

This action was commenced after the passage of this Act of 1901, and one of the parties was a foreign corporation. The other was a citizen of Porto Rico.

By Section 34 of the Act establishing the government of Porto Rico, the District Court of the United

States for Porto Rico, is required to proceed in cases within its jurisdiction in the same manner as a Circuit Court of the United States. This adopts for that Court the general common law rules of pleading in common law cases, such being the manner in which the Circuit Court proceeds in the absence of any State practice to which its practice could be assimilated by R. S., § 914. That section could have no application in Porto Rico.

## Assignments of error.

The following among others were alleged as errors in the Court below (Record, pp. 22, 24, 25):

"NINTH.—That said District Court of the United "States for Porto Rico erred in refusing to direct "the jury, upon request of plaintiff in error, after "they had returned a verdict in a lump sum, and "before the jurors had been polled, to retire and "return a separate verdict, showing the amount "found by them separately upon the building and "upon the stock of goods, merchandise and provisions, as provided by the policy for insurance "sued on."

"FOURTEENTH.—The said District Court of the "United States for Porto Rico erred in charging "the jury over the exceptions of plaintiff in error "as follows:

> "'The defense mainly relied upon here is "that this loss occurred during an invasion, "riot, civil commotion, military or usurped "power, or martial law. A fair construction "of that condition of the policy, in the "opinion of the Court, is that that must, in "order to excuse this company from liability "in case of loss of property by fire, that invasion by a foreign enemy, rebellion, insurrection, riot, civil commotion, military or "usurped power or martial law, must have "been occurring in the section of the country "where this loss occurred, or within the

"locality, and within such a radius of coun-
"try where that loss occurred, that danger
"arose to property by reason of the existence
"of that rebellion, invasion, insurrection,
"civil commotion, and military or usurped
"power or martial law. And I further tell
"you, gentlemen, that if you believe from the
"evidence that this destruction of this prop-
"erty did not occur from any of these causes,
"and occurred from a cause independent of
"the existence of any foreign enemy, rebel-
"lion, insurrection, riot, civil commotion,
"military or usurped power or martial law,
"that then you should find for the plaintiff
"in damages whatever you think may have
"been his loss, provided you believe the in-
"surance existed on the property. This is a
"reasonable construction of the law, as the
"Court thinks, of this and these conditions
"of the policy.'"

"Plaintiff in error assigns this charge of the Court "as error, because it varied the terms and contract "contained in the policy of insurance sued upon and "offered in evidence, and which had been accepted "by the insured, and that the effect of such ruling "was to narrow the application of the language of "such policy and to limit the defense of plaintiff in "error thereunder to proof that the loss was a di-"rect result of one of those enumerated conditions "or causes."

"FIFTEENTH.—The said District Court of the "United States for Porto Rico erred in refusing "the request of plaintiff in error for a charge as "follows:

"'If you believe that the loss occurred
"during the existence of invasion, foreign
"enemy, rebellion, insurrection, riot, civil
"commotion, military or usurped power or
"martial law, then you will find for the de-
"fendant.'

"to which ruling plaintiff in error then and there "excepted.

"SIXTEENTH.—The said District Court of the "United States for Porto Rico erred in its ruling "upon the said request of plaintiff in error, in the "following language:

> "'I understand you are claiming, for in- "stance, if the Germans invaded San Juan "and got into San Juan, and if this property "and this place had been destroyed by a boy "dropping a match, that the company would "be released. The Court has not that in "view.'

"SEVENTEENTH.—The said District Court of the "United States for Porto Rico erred in refusing to "charge the jury as requested by plaintiff in error:

> "'That if the jury believes from the evidence "that if at the time of the fire, or prior "thereto, the title to the stock of goods which "had been insured had passed out of Fran- "cisco Martin and into another person, or "other persons, the plaintiff herein could not "recover,'

"to which action of the Court the plaintiff in error "then and there excepted.

"Plaintiff in error assigns this ruling as error, be- "cause of the testimony of plaintiff, Ruperto Mar- "tin, that the stock of goods *re*covered by the in- "surance, was owned and controlled at the time of "the fire by the society or firm of Martin Brothers, "of which the insured, Francisco Martin, was, at "the time of said loss, only a sleeping or silent part- "ner."

The argument in support of these several errors with references to the testimony and the rulings of the Court and proceedings on the trial appears in the following points.

# POINTS.

## FIRST POINT.

### This Court has jurisdiction of this case.

The act establishing the Government of Porto Rico (Act of April 12, 1900, Ch. 191, 31 Stat., 85), contains the following:

"Sec. 35. That writs of error and appeals from "the final decisions of the Supreme Court of Porto "Rico and the District Court of the United States "shall be allowed and may be taken to the Supreme "Court of the United States in the same manner "and under the same regulations and in the same "cases as from the Supreme Courts of the Territo- "ries of the United States; and such writs of error "and appeals shall be allowed in all cases where "the Constitution of the United States, or a treaty "thereof, or an act of Congress is brought in ques- "tion, and the right claimed thereunder is denied."

The law determining the cases in which writs of error to and appeals from the Supreme Courts of the Territories of the United States may be taken, appears in the following statutes:

Revised Statutes, Sec. 702.

Act of March 3, 1885, Ch. 355, 23 Stat., 443.

Act of March 3, 1891, Ch. 517, § 15, 26 Stat., 826, 828 (known as the Circuit Court of Appeals Act).

By Section 702 of the Revised Statutes "the final "judgments and decrees of the supreme court of "any Territory, except the Territory of Washing- "ton, in cases where the value of the matter in "dispute, exclusive of costs, &c., exceeds $1,000,

" may be reviewed and reversed or affirmed in the " Supreme Court, upon writ of error or appeal, in " the same manner and under the same regulations " as the final judgments and decrees of a circuit " court. In the Territory of Washington the value " of the matter in dispute must exceed $2,000, ex- " clusive of costs. And any final judgment or " decree of the supreme court of said Territory in " any cause [when] the Constitution or a statute or " treaty of the United States is brought in question " may be reviewed in like manner."

The Act of March 3, 1885, Ch. 355 (§ 1), raised the jurisdictional amount to $5,000 in the case of all territories, but provided (§ 2) that " the preceding section shall not apply to any " case wherein is involved the validity of any patent " or copyright, or in which is drawn in question the " validity of a treaty or statute of or an authority " exercised under the United States; but in all such " cases an appeal or writ of error may be brought " without regard to the sum or value in dispute."

The Act of 1891, establishing the Circuit Court of Appeals, contained the following provision.

" Sec. 15. That the Circuit Court of Appeal in " cases in which the judgments of the Circuit Courts " of Appeal are made final by this act shall have the " same appellate jurisdiction, by writ of error or " appeal, to review the judgments, orders and de- " crees of the Supreme Courts of the several " Territories as by this act they may have " to review the judgments, orders and decrees " of the District Court and Circuit Courts; and for " that purpose the several Territories shall, by orders " of the Supreme Court, to be made from time to " time, be assigned to particular circuits.

By Section 5 of the same act, writs of error and appeals are allowed to this Court directly from the District and Circuit Courts in certain enumerated cases.

By Section 6 of the same act, the judgment or decrees of the Circuit Courts of Appeals are made final "in all cases in which the jurisdiction is depend- "ent entirely upon the opposite parties to the suit or "controversy being aliens and citizens of the United "States or citizens of different States; also in all "cases arising under the patent laws, under the "revenue laws, and under the criminal laws and "in admiralty cases."

It has been held in *Shute* v. *Keyser*, 149 U. S., 649; *Aztec Mining Co.* v. *Ripley*, 151 U. S., 79; *Folsom* vs. *The United States*, 160 U. S., 121; and *Simms* v. *Simms*, 175 U. S., 162, 166, where the effect of these statutes is considered, that the appellate jurisdiction of this Court from Supreme Courts of the Territories remains unimpaired, except as such appellate jurisdiction is transferred to the Circuit Courts of Appeals by the Act of 1891.

In *Shute* v. *Keyser*, *supra*, the Court says (p. 651):

> "There was no provision [in the Circuit "Court of Appeals Act] for appeals or writs "of error in cases not made final by Section "Six from the Supreme Courts of the Ter- "ritories to the Circuit Courts of Appeals, "and there was no express repeal of the pro- "visions of the prior acts regulating appeals "or writs of error in such other cases from "those courts to this. There is nothing to "indicate an intention that the judgments "and decrees of the Supreme Courts of the "Territories should not be susceptible of re- "view in the class of cases in which there "was no appeal or writ of error to the Cir- "cuit Courts of Appeals.
>
> "The result is that, as the acts regulating "appeals or writs of error from or to the "Supreme Courts of the Territories to or "from this Court were not repealed, except "to the extent specified, an appeal or writ of "error lies to this Court from the judgments "or decrees of those courts, except in cases "where the judgments of the Circuit Courts "of Appeals are made final."

See also *Union Central Life Ins. Co. v. Champlin*, 116 Fed. Rep., 858.

This case does not fall within either of the five enumerated cases by which, under the Act of 1891, the judgments or decrees of the Circuit Courts of Appeals are made final.

It obviously is not a case arising under the patent laws, the revenue laws, the criminal laws, nor is it an admiralty case.

Nor is it a case where the jurisdiction of the Court below is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States.

It may be suggested that the fact that this is a suit between an alien and a citizen of Porto Rico brings the case within the first of these specified classes of cases under Section 6 of the Act of 1891. It is clear, however, that the plaintiff in this suit is not alleged to be nor is he in fact a citizen of the United States.

Section 7 of the act establishing the Government of Porto Rico (31 Stat., 79), provides "that all in-"habitants continuing to reside therein who were "Spanish subjects on the 11th day of April, 1899, "and then resided in Porto Rico, and their children "born subsequent thereto, shall be deemed and held "to be citizens of Porto Rico and as such entitled "to the protection of the United States, except "such as shall have elected to preserve their alle-"giance to the crown of Spain on or before the 11th "day of April, 1900, in accordance with the provi-"sions of the treaty of peace between the United "States and Spain entered into on the 11th day of "April, 1899; and they together with such citizens "of the United States as may reside in Porto Rico, "shall constitute a body politic under the name of "the people of Porto Rico, with governmental "powers as hereinafter conferred and with power "to sue and be sued as such." The act clearly distinguishes between citizens of Porto Rico and citizens of the United States.

What is alleged in the pleadings with regard to

the plaintiff is that he is a citizen of Porto Rico (amendment to Declaration, Record, p. 12).

The cases in which the jurisdiction of the Circuit Courts is dependent entirely upon the opposite parties being aliens and citizens of the United States or citizens of different States are those in which the jurisdiction is given to the Circuit Courts of the United States by existing statutes. By the Act of August 13, 1888, Ch. 866, § 1, 25 Stat., 434, it is provided "that the Circuit "Courts of the United States shall have original "cognizance, concurrent with the courts of the "several States, of all suits of a civil nature, at "common law or in equity * * * in which "there shall be a controversy between citizens of "different States, in which the matter in dispute "exceeds, exclusive of interest and costs, the sum "or value aforesaid [*i. e.*, of $2,000] * * * or a "controversy between citizens of a State and "foreign States, citizens or subjects, in which the "matter in dispute, exceeds, exclusive of interest "and costs, the sum or value aforesaid."

The suits of which the Circuit Court has jurisdiction in which an alien is a party are necessarily limited by the Constitution to "controversies "between a State or the citizens thereof and "foreign States, citizens or subjects" (Constitution, Art. 3, Sec. 2). This does not include under the term "citizens thereof" a citizen of Porto Rico; it necessarily means a citizen of one of the United States. And this limitation of suits in which an alien is a party to suits between aliens and citizens of the United States is recognized in the 6th Section of the Circuit Court of Appeals Act, which has received a construction excluding its application to suits between foreign States and a citizen of the United States.

*Colombia v. Cauca Co.*, 190 U. S., 524, 526.

The language of the sixth section with regard to the class of controversies based upon diversity of citizenship is too plain and unambiguous to be extended by implication or upon a supposed analogy to a case between an alien and a citizen of Porto Rico, the language being "dependent entirely upon the opposite parties to the suit in controversy being aliens and citizens of the United States, or citizens of different States."

The clause in the 35th section of the act establishing the government of Porto Rico, "and such writs "of error and appeal shall be allowed in all "cases where the Constitution of the United "States, or a treaty thereof, or an act of "Congress is brought in question and the right "claimed thereunder is denied," does not restrict the scope of the language of the first clause "in the "same cases as from the Supreme Courts of the "Territories of the United States" to cases coming within the second clause. It is introduced into this section undoubtedly for the purpose of defining in what cases appeals are to be allowed in causes involving Federal questions, and in one respect it is more restricted than the rule adopted by the Statute of 1885 (23 St., 443), in regard to appeals from the Supreme Courts of Territories in causes raising Federal questions, inasmuch as in cases brought from Porto Rico, there is the additional requirement that the right claimed under the Constitution, treaty or law of the United States must be denied by the judgment or decree, whereas in the appeal from Territorial Courts it is enough that the question under the Constitution be involved in the case. This distinction is pointed out in *Snow* v. *U. S.*, 118 U. S., 346–352.

This difference in the rule in respect to cases involving Federal questions would sufficiently account for the introduction of this second clause without supposing an intention of Congress to restrict the scope of the first clause to cases falling within the

terms of the second clause, which would in effect render the first clause inoperative and unnecessary.

But for another reason the second clause should be construed as giving this Court appellate jurisdiction in addition to that given by the first clause, because there are clearly cases coming within the second clause which are not within the first clause.

By the 5th section of the Judiciary Act of 1891 appeals or writs of error may be taken from the district courts or from the existing Circuit Courts direct to the Supreme Court, in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. This does not include a case where a right is claimed under a statute of the United States and that claim is denied.

In writs of error to and appeals from the District and Circuit Courts, the judgments and decrees of the Circuit Court are by the 6th section made final in all cases other than those provided for in the 5th section unless otherwise provided by law. Therefore in either of the five classes of cases in which the judgment of the Circuit Court of Appeals is made final by the 6th section of the act of 1891, arising in the District Court of the United States for Porto Rico, as for instance, in a revenue or patent suit the judgment of the Circuit Court of Appeals on error to or appeal from the District Court of the United States for the district of Porto Rico would be final under the first clause of Section 35, even although a right claimed under a statute of the United States were denied and it would not be appealable to this Court but for this second clause of Section 35 which in such case gives

an appeal to this Court. There being then cases in which appellate jurisdiction is given to this Court by the second clause which the Court would not obtain under the first clause the fair construction of this additional clause is that it was intended to enlarge and not to restrict the jurisdiction given under the first clause.

There is nothing in the 34th section of the act establishing the government of Porto Rico which is inconsistent with the construction of the 35th section hereinbefore contended for.

The 34th section provides as follows: "The laws "of the United States, relating to appeals, writs of "error and *certiorari*, removal of causes, and other "matters and proceedings as between the courts of "the United States and the courts of the several "States shall govern in such matters and proceed-"ings as between the District Court of the United "States and the courts of Porto Rico."

There is some obvious confusion in the language of this clause, inasmuch as there is no such thing as an appeal or a writ of error, and perhaps no such thing as a writ of *certiorari*, between the District Court of the United States and the courts of Porto Rico, and the only one of the things mentioned which seems applicable as between these two courts is the removal of causes, which is applicable, since the District Court of Porto Rico has the powers and jurisdiction of a circuit court of the United States. This leads to the suspicion that some words should be supplied to make the provision sensible and applicable to the subject matter.

In the act to provide a government for the territory of Hawaii, passed during the same month-April 30, 1900, 31 St., Ch. 339, a somewhat similar provision occurs. Section 86, page 158, established a district court, which, like the District Court of the United States for the District of Porto Rico, is given the powers of a circuit court as

well as of a district court of the United States, and provides for an appeal therefrom to the Circuit Court of Appeals of the Ninth Circuit and contains the following provision: "The "laws of the United States relating to appeals, "writs of error, removal of causes and other mat- "ters and proceedings as between the courts of the "United States and the courts of the several States "shall govern in such matters and proceedings as "between the courts of the United States and the "courts of the Territory of Hawaii."

In *Ex parte Wilder's Steamship Co.* (183 U. S., 545), the question arose whether an appeal could be taken to the Circuit Court of Appeals for the Ninth Circuit from a final decree of the Supreme Court of the Territory of Hawaii, in an admiralty case pending in that Court at the time of the annexation of Hawaii to the United States. This Court in considering that statute determined that no such right of appeal was thereby given. The petitioner seems to have relied on Section 86, and in reference to the clause above quoted the Court say, "And the re- "maining clause as to appeals, writs of error, re- "movals of causes and other matters and proceed- "ings between the courts of the United States "and the courts of the Territory of Hawaii "provides that they shall be governed not "by the laws applicable to other territories, but "by the laws of the United States as to such mat- "ters and proceedings as between the courts of the "United States and the courts of the several States. "Congress may have considered that owing to the "great distance of the Territory of Hawaii from "the Continent, the appellate jurisdiction over that "Territory should be more restricted than over "other territories, and should extend only as in the "case of the several States to judgments against a "right claimed under the Constitution, laws or "treaties of the United States."

It seems to be assumed in this observation of the Court that the clause above quoted as to writs of error, appeals, &c., was intended to provide not only a rule in respect to procedure, but also in respect to the cases in which appeals could be taken, although perhaps this ruling was not essential to the point determined in the case before the Court. But assuming that this Court did so decide, the same construction could not be applied to the somewhat similar provision in the 34th Section of the Act for the Government of Porto Rico.

Admitting that the laws of the United States relating to appeals may include as well laws defining the cases in which appeals may be taken as laws regulating the procedure on appeals, yet in the Porto Rico Act we find another section (35) which expressly and in terms deals with the matter of the cases in which appeals may be taken. This being so, that section will be held to define those cases, and the appeals thus given will be neither enlarged nor restricted by doubtful language in another section which may be limited to matters of procedure. In other words, a right of appeal expressly given in Section 35 will not be deemed taken away by doubtful words in Section 34, the language of which may have been intended to govern procedure only.

In the Hawaiian Act there was no section corresponding to Section 35 in the Porto Rico Act, nor any provision in any part of the act which could be construed as giving any appeal from the Supreme Court of the Territory other than this particular clause in Section 86.

Therefore, the case of *ex parte Wilder's Steamship Company* has no force as an authority against the construction here contended for of Section 35 of the Porto Rico Act, even if it is assumed for the purpose of giving some intelligent meaning to the language that the words "as between the District Court of the United States and the courts of Porto Rico" in Section 34 mean "as between the courts of the United States and the courts of Porto Rico."

In the foregoing argument it is assumed, for the sake of the argument, that the test in respect to a territorial case of the finality of the judgment of the Circuit Court of Appeals, and hence the test of the appealability of the case to the Circuit Court of Appeals is whether it would be appealable under Section Six if the same case had arisen in a Circuit Court of the United States and the parties were an alien and a citizen of the United States or citizens of different States, and this seems to have been assumed by the courts in some of the cases cited above.

Thus in the case of the *Aztec Mining Company* v. *Ripley* (53 Fed. Rep., 7), the plaintiff in the court below (Ripley), a resident of New Mexico, sued the Aztec Mining Company, a corporation organized under the laws of New Mexico, in an action at law. The question was whether the judgment below in favor of Ripley was appealable to the Circuit Court of Appeals, under Section 15. Judge Shiras, in giving the opinion of the Court says:

> " By order of the Supreme Court, the terri-
> " tory of New Mexico has been assigned to
> " this Circuit, and this Court, therefore, pos-
> " sesses over the decrees and judgments of
> " the Supreme Court of that territory the
> " jurisdiction that is conferred by the section
> " of the Act of March 3, 1891, above cited.
> " This section expressly limits the appellate
> " jurisdiction of this Court to cases in which
> " the judgment of this Court is made final by
> " the provisions of the Act of March 3,
> " 1891. Section 6 of that act enacts
> " that 'the judgments or decrees of
> " ' the Circuit Courts of Appeal shall
> " 'be final in all cases in which the jurisdic-
> " ' tion is dependent entirely upon the oppo-
> " ' site parties to the suit or controversy being
> " ' aliens or citizens of the United States or
> " ' citizens of different States; also in all cases
> " ' arising under the patent laws, under the
> " ' revenue laws and under the criminal laws
> " ' and in admiralty cases.'

> "The case at bar does not come within "any one of the classes wherein the judg- "ment of this Court is declared to be a "finality. It is not a case in admiralty, nor does "it arise under the criminal, revenue or patent "laws of the United States, nor is it a case "between aliens and citizens of the United "States or between citizens of different States; "and, therefore, it does not belong to any of "the classes of cases in which this Court is "clothed with appellate jurisdiction."

The learned Judge here states correctly in the terms of the 6th section, the test of finality and appealability, namely, that the jurisdiction is dependent entirely upon the opposite parties in the suit or controversy being aliens and citizens of the United States or citizens of different States, but when he comes to show that the case is not within the test he says: "Nor is it a case between aliens and citizens of the "United States or between citizens of different "States." This does not show that the test was not properly applied or was not intended to be properly applied by the learned Judge, because if the case was not a case between aliens and citizens of the United States or between citizens of different States then the jurisdiction of the Court below could not be dependent entirely upon that diversity of character in the parties. It was enough perhaps in order to show that the case was one in which the jurisdiction below did not depend upon the diverse character of the parties to point out that the parties were not of this diverse character, and it cannot be argued from this mode of dealing with the subject that the learned Judge thought the real test under the 15th Section was the diverse character of the parties, rather than the fact that the jurisdiction of the Court below depended thereon. So when the case came to this Court (*Aztec Mining Co.* v. *Ripley*, 151 U. S., 79), the learned Chief Justice, in delivering the opinion of the Court, says:

> "By the fifteenth section of the Judiciary
> " Act of March 3, 1891, the Circuit Courts of
> " Appeals, in cases in which their judgments
> " were made final by the act, were empow-
> " ered to exercise appellate jurisdiction over
> " the judgments, orders or decrees of the
> " Supreme Courts of the several territories;
> " but as this case was not a case in admiralty,
> " nor a case arising under the criminal, rev-
> " enue or patent laws of the United States,
> " nor a case between aliens and citizens of
> " the United States or between citizens of
> " different States, it did not belong to
> " either of the classes defined by Section 6 of
> " that act, as cases in which the judgments
> " or decrees of the Circuit Courts of Appeals
> " should be final, and therefore the Circuit
> " Court of Appeals for the Eighth Circuit
> " properly declined to take jurisdiction."

This statement would be equally true if the true test is that the jurisdiction of the Court below was dependent wholly on this diversity in the character of the parties. If the parties are not of that character then the jurisdiction below cannot depend on it. The assumption, therefore, or possible assumption, that in territorial cases the test is the diverse character of the parties and not the question whether by reason of that diversity of character the Court below had jurisdiction, does not clearly appear in these *dicta*, although they are susceptible of that view. They are also quite consistent with the theory that the courts apparently making these assumptions had clearly in mind at the same time that the test was whether the jurisdiction of the Court below was thus entirely dependent on the character of the parties.

So in *Folsom* v. *United States* (160 U. S., 121, 126), the learned Chief Justice says:

> "The fifteenth section confers appellate
> " jurisdiction on the Circuit Courts of Appeals
> " to review the judgments of the Supreme
> " Courts of the Territories, but it is in terms

> " the same appellate jurisdiction as conferred
> " by the sixth section in respect of the judg-
> " ments of District and Circuit Courts, and
> " this being so, is limited to those cases in
> " which, if decided by the District and Cir-
> " cuit Courts, the judgments of the Circuit
> " Courts of Appeals would be final."

The case before the Court was a criminal case, where the defendant had been convicted of an infamous crime, a case clearly within section five, directly appealable to this Court. The question was whether it was appealable to the Circuit Court of Appeals under the sixth section. It was held not so appealable.

This particular question as to the meaning of the first test of section six, as applied to section fifteen, relating to territorial cases, was not before the Court for decision. And what is said, as quoted above, is true in either view that may be taken of this question, because the appellate jurisdiction is the same as it would be in the same cases brought from the Circuit Court under section six, namely, that the jurisdiction of the Court below was dependent not on alienage and citizenship or diverse citizenship *per se*, but on that being the sole ground of jurisdiction in the Court below.

That the appellate jurisdiction is limited " to " those cases in which, if decided by the District " and Circuit Courts, the judgments of the Circuit " Courts of Appeals would be final," is undoubtedly true if in fact it is still more strictly limited to such of those cases in which the jurisdiction of the Court below was thus entirely dependent on the character of the parties.

And in *Union Central Life Ins. Co.* v. *Champlain* (116 Fed. Rep., 858) Judge Sanborn says, page 859:

> " It will be noticed from this quotation that
> " jurisdiction is given to this Court only in
> " cases in which its judgments are made final
> " by the act of March 3, 1891. Those cases

> " are specified in section 6 of that act, which
> " reads: 'And the judgments or decrees of
> " the Circuit Courts of Appeals shall be final
> " in all cases in which the jurisdiction is de-
> " pendent entirely upon the opposite parties
> " to the suit or controversy, being aliens and
> " citizens of the United States or citizens of
> " *different* States; also in all cases arising
> " under the patent laws, under the revenue
> " laws, and under the criminal laws, and in
> " admiralty cases. The jurisdiction in this
> " case is not dependent upon the opposite
> " parties to the suit or controversy. It does
> " not appear from the record that these par-
> " ties are aliens on the one side and citizens
> " of the United States on the other, or that
> " they are citizens of different States. This
> " is not a case arising under the patent laws,
> " the revenue laws, or the criminal laws, nor
> " is it an admiralty case. Hence it does not
> " fall within the jurisdiction of this Court."

This is subject to the same criticism as the case of *Aztec Min. Co.* v. *Ripley*. The reason given that the diverse citizenship did not exist was in fact decisive of the question whether the jurisdiction depended on it.

But it seems quite clear that the first specification of Section six of the Circuit Court of Appeals Act has no practical application to territorial cases. The jurisdiction of the territorial courts never depends entirely on such diversity of nationality or citizenship. They are courts having a general jurisdiction in law and equity. Any person may sue any other person found within the territorial jurisdiction without regard to alienage or citizenship. And since the Amendatory Act of 1901 this is true of the jurisdiction of the District Court of the United States for Porto Rico. If *either* party is an alien or a citizen of the United States that Court has jurisdiction; and although the Court is called the District Court of the United States it is merely a statutory Court not exercising any part of the judicial power of the

United States, and it was competent for Congress to make this provision. As all men who are not citizens of the United States are aliens, including citizens of Porto Rico under the latter designation the jurisdiction of the Court as regards persons seems to be co-extensive with that of the territorial courts.

Section 15 of the Circuit Court of Appeals Act obviously applies the same tests of finality of judgment and hence of appealability as Section 6 to each case as it arises. One of these tests is, is it a case where the jurisdiction of the Court below was dependent on the opposite parties being of a certain character. Inasmuch as with a territorial court jurisdiction is never so entirely dependent this test becomes practically inapplicable. The other tests remain and are practically operative, since a patent case, a revenue or criminal, or an admiralty case may come into these courts. If this first test were the only test of appealability, then indeed, it might be necessary to construe it as meaning if the jurisdiction in a case between the same parties in a circuit or district court were thus dependent, as otherwise there could never be a case made final or appealable by the application of this test, but this not being the only test it simply becomes practically inoperative or inapplicable in cases under the fifteenth section. The test remains, but no case can ever arise under it. Thus, suppose territorial courts had no jurisdiction in patent cases, the specification of patent cases would as regards territorial cases become in the same way practically inoperative or inapplicable, or, it may be said the test would remain but there would be no cases coming within it.

The proper construction of Section 15 would seem to be this, that as regards territorial cases the test of finality and of appealability to the Circuit Court of Appeals is precisely the same as in cases arising in circuit and district courts. Now, the test in

these cases is not the political character of the parties to the action, but whether the jurisdiction of the Court below depends entirely on that political character. In the Circuit and District Courts it would so depend, unless there were some other ground of jurisdiction. In territorial cases it would not. Hence the one would be appealable, the other not.

The cases between aliens and citizens of the United States or between citizens of different States in territorial courts must be insignificant in number compared with the whole number of cases litigated in those courts, and there seems to be no reason of public policy requiring this particular class or small number of their judgments to go to the Circuit Courts of Appeal, while all other cases not revenue, criminal, patent or admiralty cases involving $5,000 at least come to this Court. Giving this natural interpretation to the 15th Section will not appreciably burden this Court.

This question can only arise directly in a case coming from a territorial court or from the District Court of the United States for Porto Rico between an alien and a citizen or between citizens of different States. No such case seems to have arisen.

If this suggested construction is correct then this Court has jurisdiction because the case is neither a patent, a revenue or criminal or an admiralty case nor one in which the jurisdiction of the Court below is entirely dependent on the parties being an alien and a citizen or citizens of different States.

For the decision of the present case, however, it seems to be conclusive that the parties were an alien and a citizen of Porto Rico, and not an alien and a citizen of the United States.

## SECOND POINT.

**The Court erred in its rulings with reference to the defense that the policy had become void by the transfer of the personal property covered by the policy from Francisco Martin, the assured, to Martin Brothers, his sons, although he retained an interest, as it is stated in the Record, as a silent partner.**

Upon the undisputed evidence in the case the policy was avoided by this change of interest in the stock of goods, part of the property insured. By the fifth condition of the policy it was to become void if any of the properties insured in it passed to another person or any person not proceeding from testamentary disposition or from the operation of laws, if the company is not informed and the insurance in favor of the new owner is not declared by a note endorsed on the policy by the company or its representative.

The property insured was a building situated at Cobo Laurel and the goods, chattels and merchandise and provisions in said building kept and contained. It appears by the record and by the charge of the Judge that the goods insured were a shifting stock of merchandise. The fact of change of interest was shown by the testimony of the plaintiff himself. The plaintiff testified (Record, p. 31, fol. 51):

> " Q. In the year 1898 did your father have
> " that building—was he the owner of it?
> " A. Yes.
> " Q. What interest did your father have in
> " these goods and stock?
> " A. He was a silent partner."

The insurance was £700 on building, £900 on stock in trade in said building and groceries (Policy, Record, p. 32, fol. 52).

The plaintiff testified that the stock consisted of provisions, merchandise, shoes, hats, everything carried in a commercial house, coffee, tobacco, rice and other articles (Record, p. 36, fol. 57); that it was all destroyed by fire (Record p. 40, fol. 60); that the firm consisted of his brother and himself; that his father was a silent partner, having an interest of $10,000 in the firm; and that the insurance was continued in his father's name but for the benefit of the three (Record, pp. 43, 44, fol. 63).

On cross-examination the plaintiff testified that he was an active partner (Record, p. 44, fol. 64); that the firm was founded in 1897, and his father retired as active partner, and that the business was turned over to Martin Brothers, who managed the business (Record, p. 45, fol. 65); that the building was worth 4,000 pesos ($2,400), and the provisions and merchandise 15,000 pesos ($9,000) (Record, p. 47, fol. 67).

There was no other testimony in respect to the title of this stock of goods. By this testimony it also appeared that the goods constituted the principal part of the property insured, and the Court even refused to direct the jury to find separately the value of the building and of the goods burned, to which the defendant excepted (Record, p. 84, fol. 113).

A transfer to a firm including the insured is a transfer within the condition of the policy and avoids it. The rule and the principle on which it rests is thus stated by the New York Court of Appeals in the *Germania Fire Ins. Co.* v. *Home Ins. Co.*, 144 N. Y., 195, 199.

> "It would be a harsh and indefensible rule
> "that required the underwriter, who had in-
> "sured an individual on a stock of goods in a
> "store, to continue the insurance after the in-
> "sured had taken in two partners and formed

"a firm wherein each partner was vested
"with an undivided third interest in the
"property covered by the policy, without
"having been afforded the opportunity to
"examine into the moral and business char-
"acters of two strangers to the original con-
"tract."

The principle also is well stated by Mr. Justice Miller in delivering the opinion of the Circuit Court of Appeals in *Drennen* v. *London Assurance Corp.*, 20 Fed. Rep., 657–8, as follows:

"The sale or transmutation of the various
"interests between the partners themselves,
"and nobody else having the control, and
"leaving the possession where it was, does
"not invalidate the policy; but the introduc-
"tion of a new partner, with an investiture
"of an interest in him which he did not have
"before, does avoid the policy.

"There are two things with regard to
"which the insurers are always cautious,
"tenacious and anxious; one of them is the
"character of the men with whom they
"make the contract, and the other is the
"character of the man who has possession of
"the property, especially if it be movable
"property that is insured; and it is easy to
"see why this is so. They may very well
"know that the man or men with whom
"they deal when the contract is made are
"cautious, prudent business men, honest,
"and for a long time successful in business;
"with those men they contract without hes-
"itation. They have the right to know who
"those men are with whom they contract and
"the character of the men with whom they con-
"tract with regard to the possession of the
"property. They make a contract with A, be-
"cause they know him, or because they have
"heard of his character; because they under-
"stand that he is honest and fair; and they
"deal with him just as you would deal with
"one whom you know to be reliable; you
"will seek to deal with honest men only.
"Now, it is against all the principles of con-
"tracts to say that in dealing with one man

"or with two men, that those two can after-
"wards, acting without the consent of the
"other party, introduce another man into the
"contract, who has all the rights and all the
"control which those two had before, because
"that man may be a scoundrel, may be
"known to be a scoundrel by the insurance
"company; and if that rule prevails, the
"other parties have a right to introduce the
"veriest scum of the earth, and men who
"have half a dozen times been engaged in
"the destruction of property to get the in-
"surance. So you may sell the goods in-
"sured, but you cannot sell the policy unless
"the company agrees to it. We are of the
"opinion that if Mr. Arndt was, within the
"meaning of that policy, introduced into that
"partnership, and became a member of it
"before the loss, and acquired an interest in
"the goods, that the policy was forfeited."

And although that case came to this Court and was reversed, the reversal was wholly on the ground of error in finding that there was a partnership formed by written agreement and that by force of this written agreement there was a change of interest.

*Drennen* v. *London Ass. Corp.*, 113 U. S., 51.

*London, Ass. Corp.* v. *Drennen*, 116 U. S., 461.

This, then, being the undoubted fact on the plaintiff's own testimony, and the effect of the evidence being that the policy became void, the further question is whether there was error available to the plaintiff in error in the rulings of the Court with regard to this defense. In the course of the charge of the Judge to the jury, the Judge said:

"Another defense presented is, that the
"property passed by mortgage or transfer
"without the consent of the company. I
"have no recollection of any testimony on
"that point."

At the close of the charge the following occurred:

> "*Mr. Dexter* [Defendant's Counsel]: I failed "to hear any reference to the alienation of "the stock. The defendant would ask the "Court to charge that if the jury believes "from the evidence that if, at the time of "the fire or prior thereto, the title of the "stock of goods which had been insured had "passed out of Francisco Martin and into "another person or other persons, the plain- "tiff herein could not recover.
>
> "*The Court:* That I could not give be- "cause the testimony does not support it. "There is no testimony that there has been "an alienation to anybody else. If to a "partner, however, the partner has an in- "terest in the entire stock of the goods in- "sured.
>
> "*Mr. Dexter:* We simply ask for a modifi- "cation of the charge to state that if there "was an alienation——
>
> "*The Court:* I do not think there was any "testimony to support the statement that "there was any alienation.
>
> "*Mr. Dexter:* Defendant makes that re- "quest upon the testimony of the witness.
>
> "*The Court:* Do not state the testimony. "Save an exception.
>
> "Gentlemen of the jury retire and make "a verdict" (Record, pp. 83–4, fols. 111–2).

The Court apparently took the view that an alienation to a firm of which the insured was a partner was not an alienation within the terms of the policy. Upon the authorities above cited it is insisted that this was clearly error, and that this request for a charge was correct and the exception taken was good.

This error of the Court in refusing to charge that if they found that the title to the goods had passed out of Francisco Martin to other persons the plaintiff could not recover is covered by and sustains the seventeenth assignment of error.

After the verdict and before the jury was polled it was error also for the Court to refuse to instruct

the jury to separate the damages found by them for loss upon the building and the stock of goods, because as to the stock of goods certainly the point was well taken that the policy had become void (Record, p. 84, fol. 113), and the ninth assignment of error covers this point and was well taken.

This ruling of the Court deprived the defendant of the right to have the verdict limited to the building if the condition did not affect the insurance on the building also.

This defense of a change of interest was fairly raised by the special plea and also by the general issue.

The seventh plea (Record, p. 14, fol. 20), was sufficient to raise this question. The plea of the general issue also raised the question.

In *Edson* v. *Weston* (7 Cow., 280), SAVAGE, *Ch. J.*, says:

> "In assumpsit, most defences are admis-
> "sible under the general issue. The plea,
> "indeed, denies simply that there was such
> "a contract. But the practice under it has
> "been to receive evidence of matter in dis-
> "charge, or excuse of performance; as a
> "release, or parol discharge, payment, or
> "that it became impossible or illegal to per-
> "form the contract (1 Chit. Pl., 470–1, and
> "cases there cited). In general, anything
> "may be shown which proves that the plain-
> "tiff never had a cause of action."

So also Chitty says (Ch. Pl., 6th Am. Ed., p. 513):

> "Hence it may be collected that under the
> "general issue any matter which shows that
> "the plaintiff never had cause of action, may
> "be given in evidence; and also, that under
> "that plea most matters in discharge of the
> "action, which show that at the time of the
> "commencement of the suit the plaintiff had
> "no subsisting cause of action, may be taken
> "advantage of. As the object of pleading is
> "to appraise the adverse party of the ground
> "of defence in order that he may be prepared
> "to contest it, and may not be taken by sur-

> " prise, it is singular that under the general
> " issue, which in terms only denies a valid
> " contract, the defendant should be permitted
> " to avail himself of a ground of defence
> " which admits a valid contract, but insists
> " that it has been performed, or that there is
> " an excuse for the non-performance of it, or
> " that it has been discharged; it is, as observed
> " by Lord Holt, a practice which has crept in
> " improperly, but is now perhaps too settled
> " to be altered."

And in *Oscanyan* v. *Arms Co.* (103 U. S., 261), the Court says (pp. 266–7):

> " Whilst, however, at the common law,
> " under the general issue in assumpsit, it was
> " always admissible to give in evidence any
> " matter which showed that the plaintiff
> " never had a valid cause of action, in prac-
> " tice many other matters were allowed under
> " that plea, such as went to the discharge of
> " the original cause of action, and showed
> " that none subsisted at the commencement
> " of the suit—such as payment, release, ac-
> " cord and satisfaction, and a former recov-
> " ery, and excuses for non-performance of the
> " contract; and also that it had become im-
> " possible or illegal to perform it. 1 Chitty,
> " Pleadings, 493; *Craig* v. *The State of Mis-*
> " *souri*, 4 Pet., 410–426; *Edson* v. *Weston*, 7
> " Cow. (N. Y.), 278; *Young* v. *Rummell*, 2
> " Hill (N. Y.), 278."

The evidence in this case of the alienation of the property showed that under the policy the plaintiff had no cause of action at the time of the commencement of the suit. It also showed that the averment of the declaration that Francisco Martin, plaintiff's testator, sustained the loss and damage by the fire (Record, p. 6, fol. 10) was untrue, and this is certainly a fact to be availed of under the general issue.

Even if there had been any technical defect in the pleas, no such objection was taken on the trial by the Court or by the defendant in error. The

point taken by the Court was that there was no evidence of an alienation such as the condition in the policy called for.

## THIRD POINT.

**There was error also in the rulings of the Court with reference to the ground of defense that the policy was void, for the reason that the fire occurred during an invasion, riot, &c.**

The language of the policy is explicit, as follows:

"This policy does not cover * * * loss or "damage by fire happening during the existence of "any invasion, foreign enemy, rebellion, insurrec- "tion, riot, civil commotion, military or usurped "power, or martial law within the country or lo- "cality in which the property insured is situated, "unless proof be made to the satisfaction of the "directors that such loss or damage was not oc- "casioned by or connected with, but occurred from "a cause or causes independent of the existence of "such invasion, foreign enemy, rebellion, insurrec- "tion, riot, civil commotion, military or usurped "power or martial law" (Policy, Record, p. 33, fol. 53).

The Spanish law in force in the island at the time this policy was issued and also at the time the loss occurred, which was kept in force by Section 8 of the Porto Rican Act, expressly provided that "Un- "derwriters shall not secure against fire caused by "the crime of the insured, nor by military forces "in time of war, nor on account of those caused by "mobs, or by eruptions, volcanoes and earth- "quakes" (translation of Code of Commerce, published by U. S. War Department, 1899, Sec. 399).

The Spanish text of this provision is as follows:

"El asegurador no responderá de los incendios "ocasionados por el delito del asegurado, ni por "fuerza militar en caso de guerra, ni de los que se "causen en tumultos populares, así como de los "producidos por erupciones, volcanes y temblores "de tierra."

The fourth plea sets up this defense (Record, p. 13, fol. 20).

The testimony bearing upon this question was as follows:

The plaintiff who was called as a witness on his own behalf, on his direct-examination testified as follows (p. 44, fol. 64):

"Q. Please state whether or not you had been in "Coto shortly before the fire occurred?

"Ans. The day before.

"Q. State in what condition was Coto then so far "as tranquility was concerned?

"Ans. It was in normal condition.

"Q. Had you been before that time in Coto?

"Ans. Yes.

"Q. How long before?

"Ans. Two days.

"Q. In what condition was it then?

"Ans. Normal.

"Q. You mean to say two different days in the "week before the fire?

"Ans. Yes; different days in the same week.

CROSS-EXAMINATION:

By Mr. Dexter:

"Q. How old are you, Mr. Martin?

"Ans. Thirty years old.

"Q. At the time of this fire what were you en- "gaged in; what profession or occupation?

"Ans. I was here in Ponce with my family.

" Q. How long before that time had you been liv-
" ing in Coto?
" Ans. Three years.
" Q. How long before the fire was it that you and
" your family went down to Ponce?
" Ans. Fifteen days, more or less.
" Q. Did all the family go down with you to
" Ponce?
" Ans. The ladies of the family always lived in
" Ponce, but we men came to Ponce now and then.
" Q. What was your interest or connection in that
" business of your father prior to the fire?
" Ans. I was an active partner.
" Q. When was this society formed under the
" name of " Martin Hermanos "?
" Ans. In 1897; I believe it was in March.
" Q. Was that accomplished by means of some
" writing before a notary?
" Ans. Yes.
" Q. Did your father then retire from business as
" an active partner?
" Ans. Yes.
" Q. And the business that formerly belonged to
" him was turned over to Martin Hermanos?
" Ans. Yes.
" Q. Where did your father live after the organ-
" ization of that society?
" Ans. He lived here, and there.
" Q. Did he give any attention to the business
" after this organization?
" Ans. Yes.
" Q. Who managed the business?
" Ans. Martin Brothers.
" Q. You managed the business, did you?
" Ans. Yes.
" Q. Up to the time of the fire everything was
" peaceful and quiet in Coto, was it?
" Ans. Yes.
" Q. No excitement?
" Ans. None.
" Q. No mobs?

"Ans. None.

"Q. Nobody was threatened with death or the de-
"struction of stealing of their property?

"Ans. Nobody.

"Q. Nobody's property was taken out of their
"house by bandits or armed mobs?

"Ans. After the invasion?

"Q. Yes.

"Ans. Nobody.

"Q. After the invasion nothing of that kind
"occurred?

"The Court: I think that is going too far. The
"question is whether this property was destroyed
"by reason of a riot or invasion.

"Mr. Dexter: In the time of a riot. I am proving
"by this witness whether or not this was in any——

"The Court: You do not fix the time. It might
"be a year from the time of the fire. I do not think
"you can attack his credibility by immaterial mat-
"ter.

"Q. All these questions that I have asked you
"refer to a few days before this fire—upon the day
"of the fire or a day or two before it?

"Ans. Nobody was deprived of anything.

"Q. Nothing of the kind had happened at any
"time up to the time of the fire?

"Ans. Nothing.

"Q. You had no occasion to make any complaint
"about being attacked on or about the time of this
"fire?

"Ans. No, sir.

* * * * * *

"By Mr. Boerman (p. 47, fol. 67):

"Q. When you testified that there were no
"threatenings or attacks upon persons before the
"fire, you mean so far as your knowledge was con-
"cerned?

"Ans. There was nothing.

"Q. There may have been, so far as you do not
"know, some kind of these things?

" Ans. Before the fire there was absolutely noth-
" ing.
" Q. That is, while you were there?
" Ans. Yes.
" Q. The time you refer to is from after the inva-
" sion up to the time of the fire, is it?
" Ans. Yes."

The plaintiff having rested the defendant called as witness P. J. Rosaly, who testified that he was a sugar planter, connected with the banking house of De Ford & Co. and lived in Ponce; that from 1895 to 1899 he was connected with the firm of Felice y Cia., who did business as agents for the Royal Insurance Company (Record, p. 52, fol. 72). This witness testified as follows (p. 56, fol. 77):

" Q. Do you know the conditions that prevailed in
" the barrio of Coto Laurel on August 19, 1898?
" Ans. Yes.
" Q. With reference to insurrection, riot and in-
" vasion?
" Ans. Yes.
" Q. Please state what that was, of your own
" knowledge?
" Ans. Do you mean to say if I was present?
" Q. Do you know whether or not there was any
" invasion in progress at the time and place of your
" own knowledge?
" Ans. Yes.
" Q. What was that invasion?
" Ans. The American troops were there a little
" while before, and I went there personally the day
" after the fire.
" Q. What was the condition of affairs as you
" found them?

" The Court: That is not competent.

" Q. What time of the day did you arrive?
" Ans. In the morning about 8 o'clock.
" Q. What were the conditions that you found
" there at that time?

" Ans. The American troops were there with a " captain in charge—some prisoners and some na- " tives were running away from the place.

" Q. Do you know the occasion of the troops com- " ing there?

" Ans. Yes.

" Q. What was that? Please state what you saw " there that morning, and what was the cause of the " troops coming there?

" Ans. I saw the rest of the fire there of the house " that was burned, and some prisoners.

" Q. When did the troops land in Porto Rico?

" Ans. July 25th in Guanica and 28th in Ponce.

" Q. From the time that they landed in Ponce in " which direction did they proceed?

" Ans. Toward San Juan by the military road; " towards Utuado by the military road, and they " were at Guanica and Arroyo.

" Q. On August , 1898, or about that date what " conditions did the troops encounter about that " place, and in that vicinity?

" Ans. There had been some trouble about there at " Soto, and the troops had been ordered to go down " and occupy Coto Laurél.

" Q. Did you have occasion to go yourself to the " military commander about that time?

" Ans. Yes.

" Q. Whom did you see?

" Ans. I saw General Wilson.

" Q. Did you see this plaintiff there when you " went there to see General Wilson?

" Ans. Yes.

" Q. About when was that?

" Ans. Some days before the fire.

" Q. About how many days more or less?

" Ans. Say three.

" Q. Did you hear what he said?

" Ans. Do you mean Mr. Martin?

" Q. Yes.

" Mr. Boerman: I object to it as it is a conversa- " tion between two parties at that time that had no

" interest in this suit. This man was not executor
" then.

" Mr. Dexter: I want to contradict the other wit-
" ness.

" Q. What was said by him there at that time,
" two or three days before the fire?

" Ans. He said that the place was in a condition
" of riot and he was not secure and his properties
" *were in danger.*

" Q. Did he say anything about the provisions of
" the store being stolen and taken out of the place?

" Ans. His own place, you mean?

" The Court: Do not lead the witness. Gentlemen
" of the jury this testimony is only competent in so
" far as it may tend to contradict the plaintiff in the
" case.

" Q. Do you know if on August 19, 1898, there
" there was any insurrection or riot or civil commo-
" tion in Coto Laurél?

" Ans. Yes, the fire was attributed to that.

" The Court: Do not tell what you heard.

" Q. Please state the general condition existing
" there with reference to riot, civil commotion or
" insurrection at that time, August 19, or in those
" days immediately before the fire?

" Ans. All I know about the conditions is what I
" heard.

" Q. Where were you on August 19, 1898?

" Ans. Here in Ponce.

" Q. How far was Coto from Ponce?

" Ans. About one half an hour, or less than that.

" Q. About what time immediately prior thereto
" did you yourself see anything of a riot, civil com-
" motion or insurrection?

" The Court: Confine it to that time and place?

" Ans. I was not there immediately before the fire.

" Q. Do you know if in the vicinity of Ponce and
" Coto between the time the Americans landed in

" Porto Rico and up to the time of this fire, what the " general condition of the community around about " Coto and Ponce was with reference to insurrection " and riot?

" Mr. Boerman: I object to the question as the " place is not fixed.

" The Court: Put it at that place or the imme- " diate vicinity.

" Mr. Dexter: I think the fair construction of the " policy is not to limit it to the immediate place, but " the language of the policy is as to the existence of " a riot.

" The Court: It must be in that place; in that im- " mediate vicinity.

" Q. Do you know whether there was martial law " in Coto Laurél at that time?

" Ans. No, I do not know it.

" Q. Was there immediately upon the occasion of " the fire?

" Ans. Yes.

" The Court: I think what occurred afterwards " is not competent.

On CROSS-EXAMINATION the witness testified as follows (Record, p. 59, fol. 80):

" Q. How many days before the fire did you go to " Coto?

" Ans. Several months—one or two months.

" Q. And so, you have not been to Coto from " several months before the fire until the day after " the fire?

" Ans. Yes.

" Q. When you came to Coto what time was it?

" Ans. About eight o'clock in the morning.

" Q. Are you sure that it was not later that that?

" Ans. It was in the morning; I left here about " 7.30, and must have arrived there about then.

" (Witness retires).

" And thereupon the defendant to further main-
" tain the issues on its part, introduced as a witness
" HENRY C. FRITZE, who, being duly sworn, testified
" as follows:

" (HENRY FRITZE) for defense:

" By Mr. Dexter (p. 59, fol. 80):

" Q. Mr. Fritze, what is your full name?
" Ans. Henry C. Fritze.
" Q. Where do you live?
" Ans. Here in Ponce.
" Q. Mr. Fritze, do you know the plaintiff in this
" case?
" Ans. Yes.
" Q. Did you see him anywhere a few days before
" August 19, 1898?
" Ans. I saw Mr. Martin one night at General
" Wilson's office.
" Q. About when was that, if you remember?
" Ans. A few days after the American troops had
" disembarked.
" Q. Did you hear what he said?

" Mr. Boerman: I object to the question because
" this is hearsay and secondary evidence, unless
" they first called him and asked him and then
" wanted to contradict him with another witness.
" The Court: I think you should have asked the
" party whether he said so and so. You should
" have examined him on these points. You can
" attack him on these points by proving a different
" state of facts, but you must first ask him what
" he said in reference to it.
" Mr. Dexter: I will ask your Honor's permission
" then to recall Mr. Martin in order to examine him
" on this point.
" The Court; Well, call him.
" (Mr. Fritze makes way for Mr. Martin who
" takes the stand.)

" RUPERTO MARTIN, recalled.

" CROSS-EXAMINATION (con.):

" By Mr. Dexter (p. 66, fol. 81):

" Q. Did you not have occasion to go and see Gen-
" eral Wilson and ask for protection from the dis-
" ordered conditions that prevailed in and near Coto
" Laurél before the fire?

" Ans. The same day that the American
" troops landed I was here in Ponce. I
" heard reports from the Coto that they were
" going to burn the whole barrio that night, and
" then I sought General Wilson to make him under-
" stand that I had interests there, because on that
" same day General Miles had issued a proclamation
" in which he said he would defend the lives and
" property of the people. I asked him to lend me
" force enough to defend my interests. He imme-
" diately gave me 30 or 40 men. We left about 11
" o'clock that night. The interview that night was
" at about 9 o'clock, and we left Ponce about 11.
" We arrived at the second river and there we had
" to camp because the troops would not go further.
" In the morning we proceeded to the Coto, and we
" arrived and found nothing had occurred and the
" troops remained there in the advance.

" Q. Is it not a fact that your place was visited a
" few nights before the fire, and a large amount of
" provisions were taken out ij carts by some un-
" known men.

" Ans. It was not so it happened.

" Q. How was it?

" Ans. Bad people from Ponce arrived there
" drinking, and they continued to drink and then in
" the store they began to talk about all the
" Spaniards, and as I was the son of a Spaniard the
" moment they left the store I ordered the whole
" establishment to be locked up and came to Ponce.

" Q. Did not they take forcibly a large amount of
" provisions out of the store?

" Ans. No; they only broke the glass.

" Q. And nobody, prior to the fire, and within a " short time prior thereto took away any provisions " forcibly from your place—merchandise of any " kind?

" Ans. No, sir; except those people who came " through violence into my house.

" Q. Did you not appear before the Court to " accuse and testify as to certain persons having " stolen and taken away a large amount of pro- " visions and merchandise?

" Mr. Boerman: I object to that; the witness is a " willing witness and should not be impeached.

" The Court: No, he is your witness. Ask the " question.

" Q. was read.

" Ans. I went before the Court because these in- " dividuals, after the store had been closed, broke " down and tore, but without entering the store——

" Q. What date was it that these individuals " came there?

" Ans. Some days before the fire, I do not remem- " ber the date.

" Q. Did you not appear before the court martial " and accuse certain persons of having set fire to " this store on August 19, 1902.

" Mr. Boerman: I object to the question as it is " after the fire.

" The Court: The question is, did he not appear; " if it is not a fact that he did. Ask the question.

" Q. was read.

" Ans. No, sir.

* * * * *

" (p. 62, fol. 83).

" Q. Do you remember seeing Mr. Fritze present " during this conversation?

" Ans. Yes, there were several consuls there.

" Q. Do you remember what day it was?

" Ans. The same day the American troops landed " in Ponce.

" Q. Did you go to see General Wilson again " upon the same subject?

" Ans. No, sir.

" Q. Did you not call again and ask for protection " after that time?

" Ans. No, sir.

" By Mr. Boerman:

" Q. To make it clear, you say when you went to " see General Wilson that it was on the day the " troops entered Ponce—was it then the 25th of " July?

" Ans. It was the day the American troops came " in and the Spanish flag was hauled down.

" Q. It was in the month of July, was it not?

" Ans. I think that the landing in Guanica was " made on the 24th of July, and it must have been " the 25th, 26th or 27th when they came in here.

" (Mr. Martin retires.)

" HENRY C. FRITZE, recalled.

" By Mr. Dexter (p. 62, fol. 84):

" Q. Do you remember having occasion to call on " General Wilson in the summer of 1898 in company " with other consuls?

" Ans. Yes.

" Q. About how long after the invasion was that?

" Ans. I had occasion to see General Wilson al- " most daily for eight or ten days.

" Q. Do you recollect when it was that you saw " Mr. Martin, the plaintiff here?

" Ans. I do not recollect the exact date, but I " think it was during the first days that General " Wilson was here.

" Q. Do you know about when he arrived here?

" Ans. He arrived on the 27th of July, 1898.

" Q. And it was only a few days after that you " saw Mr. Martin?

" Ans. Yes, some time afterwards; I do not think " it was the same day.

" Q. State, if you know of your own knowledge, " there was an invasion existing in and about Coto " Laurel on the 19th day of August, 1898?

" Ans. I remember that during the first weeks the " American troops were here, there was a certain " amount of——

" Q. I speak now of invasion by foreign troops; if " there was an invasion in Porto Rico and in the " vicinity of Coto Laurel on the 19th day of August, " 1898?

" Ans. What do you mean by an invasion?

" Q. I mean a military invasion?

" Ans. A military occupation; of course there " was.

" Q. Of what nation was the invading army?

" Ans. The American troops.

" Q. With whom were these troops at war, if you " know?

" Ans. With Spain.

" Q. Do you know, of your own knowledge, if " there was an insurrection in or near the immediate " vicinity of Coto Laurel on the 19th of August, " 1898?

" Ans. I could not call it an insurrection but there " was a general state of insecurity.

" Q. What about mobs and riots in and near Coto " Laurel on the 19th of August, 1898?

" Ans. I cannot precise the date, if you ask me " whether there was a riot there on that day I " cannot say; there has taken place disorder in " Coto Laurel but I cannot remember the exact " date, so if you ask me if it was on the 19th, I " cannot say.

" Q. What was the general condition in and about " that vicinity of Coto Laurel about that time?

" Ans. Very insecure.

" Q. By what reason?

" Ans. On account of the Puerto Ricans.

" Mr. Boerman: That is merely a matter of opin-
" ion.

" Q. State whether things were normal?

" Ans. They were absolutely unnormal; not at all
" normal.

" Q. What are the facts upon which you base
" that statement?

" Ans. There was a general state of disorder
" which prevailed after the landing of the American
" troops.

" Q. In and about the vicinity of Coto?

" Ans. I know perfectly well that during the first
" days or even the first weeks after the landing of
" the American troops there was a great deal of
" disorder going on in and near the Coto, just the
" same as in the other parts.

" The Court: Was this on or about the 19th of
" August?

" Ans. About three weeks had passed since the
" Americans came in, and I recollect perfectly well
" that an orderly state of affairs had not been re-
" established by that time.

" CROSS-EXAMINATION:

" By Mr. Boerman (p. 64, fol. 85):

" Q. When were you in the Coto before the fire
" and before the 19th of August?

" Ans. It would be impossible for me to state at
" what time I went there.

" Q. Were you, during the month of August, in
" the Coto?

" Ans. I cannot say that; it is about four years
" now since then and I cannot recollect. I know I
" have not been there after the landing of the troops.

" Q. So all that you have testified is heresay?

" Ans. Oh, yes.

" Mr. Boerman: I now move the Court, under the
" witness' statement, to strike out all of his testi-
" mony as to this matter as it is hearsay only.

" The Court: You will have to confine it to the " actual conditions at the place where the insurance " existed. The object of the provision is, of course, " that the insured is not to suffer for any loss that " occurs by reason of a riot at that place or in- " vasion at that place. If you prove there is a riot *in* " Ponce, it might not reach there and he might not " be in any danger. I think the witness has to speak " of his own knowledge.

" The Witness: Will your Honor allow me to say " something? I want simply to state that in my " character as German Vice Consul I was, during " the first days of the invasion, a great deal in the " vicinity of the then authorities here, and while of " course, I was not personally present at Coto I knew " of the situation.

" The Court: Well, that is not competent."

" MARIA BALBINA RODRIGUEZ (for defendant:)

" By Mr. Dexter: (p. 65, fol. 86).

" Q. Please state your name?

" Ans. Maria Balbina Rodriguez.

" Q. Where do you live?

" Ans. Now in the Barrio Jacaguas.

" Q. Where did you live in the month of August, " 1898?

" Ans. In Coto.

" Q. Were you living there all of that month?

" Ans. Yes, and I was living there previously.

" Q. Do you remember the fire that took place " there on the night of the 19th of August, 1898, " when the house of Mr. Francisco Martin burned?

" Ans. Yes.

" Q. What was the condition in the Coto the " night the house burned; were the people quiet, " or was there any excitement going on?

" Ans. When we went to bed there was not a " great movement.

" Q. After that what was the first you knew " about the fire going on?

" Ans. Between ten and eleven we heard a move-
" ment there.
" Q. What was that movement?
" Ans. Persons and patrols of people.
" Q. What were they doing?
" Ans. That I do not know. I kept inside the
" house.
" Q. Were they quiet or noisy?
" Ans. They were very noisy; there was a great
" movement.
" Q. Do you know where these people came from?
" Ans. No, sir.
" Q. Were any estates fired, or people killed?

" The Court: Do not lead the witness.

" Q. What noises did you hear that night?

" Mr. Boerman: That is assuming that there were
" noises.
" The Court: Ask the question what occurred.

" Q. What occurred?
" Ans. At that moment we heard voices saying
" there was a fire at the house of Martin.
" Q. Did you see any strange people in town?

" Mr. Boerman: I object as it is immaterial and
" leading.
" The Court: Ask the question.

" Q. Did you see any strange people in the barrio
" that night.
" Ans. Yes.
" Q. Many or few?
" Ans. Many.
" Q. What did they seem to be doing?
" Ans. They were doing something bad, because
" there were many of them.

" The Court: Strike that last answer out?

" Q. Do you know of your own knowledge what
" was going on?
" Ans. Yes; they were burning down the houses.

" Q. Did you see any provisions or other property " taken out of any of the houses; did you see them " carry away anything, or take anything away from " the houses?

" Mr. Boerman: I think that is leading.

" The Court: Ask her what, if anything, they did,

" Q. What else did you see them doing?

" Ans. I did not see them doing anything more " but there was a fire.

" CROSS-EXAMINATION:

" Q. Did you see anybody setting fire to the " house?

" Ans. Not at night, but in the daytime.

" Q. Then when you said that they were putting " fire to the house it was only hearsay, was it not? " When you testified they were burning the houses " it was only from hearsay, was it not? You did not " see anybody putting fire to the house, did you?

" Ans. When I heard it I got up and saw it. I " heard voices saying that there was a fire at the " house of Martin and as I was living so near to it, I " got up.

" Q. How long did you sleep when you went to " bed that night; how many hours did you sleep?

" Ans. We did not sleep any because we went to " bed at 9 o'clock, and soon after that we heard the " movement.

" (Witness retires.)

" And thereupon the defendant Royal Insurance " Company to further maintain the issues on its " part, called and produced as a witness JOSÉ LARIO " ROCHE, who being duly sworn, took the stand and " testified as follows:

" JOSÉ LARIO ROCHE (for defendant):

" By Mr. Dexter (p. 66, fol. 88):

" Q. What is your name and occupation?

" Ans. My name is José Lario Roche; I am the al-
" calde of the barrio, and when the man came to
" summons me he had the wrong summons, he had
" a summons for Ramon Roche.

" The Court: That is all right. Go on if this is
" the witness you wanted.

" Q. Where did you live in the month of August,
" 1898?

" Ans. In the barrio of the Coto.

" Q. Were you there on the night of August 19
" 1898?

" Ans. I was in my store.

" Q. What was your business at that time?

" Ans. My business was having a little store a
" little lower down.

" Q. What office did you hold there at that time?

" Ans. I was the commissary of the barrio.

" Q. Please state what happened on the night of
" the 19th of August, 1898, when the house of Mr.
" Francisco Martin burned?

" Ans. That night there came a cart load of men
" from down below.

" Q. Who were these men—what kind of people
" were they?

" Ans. I did not know them.

" Q. What did they do?

" Ans. They fired an estate opposite my house and
" as I was the commissary of the barrio I told them
" not to break the peace in the place as we were in
" a state of war.

" Q. Were these people officers or soldiers?

" Ans. They were some individuals that were
" going there, and I went and told them not to fire.

" Q. At whom were they firing?

" Ans. At the air.

" Q. Were they soldiers or officers of the law?

" Ans. As it was night and dark I could not see
" their clothes, but I saw them raise a flag, or at
" least they called it that.

" Q. Did you see what flag that was?

" Ans. I saw the flag, and it was a flag—an " American flag, but it was at night and you could " not see well. They were people of the country " though because they spoke Spanish well.

" Q. What did you do then?

" Ans. They went on and as they were armed I " did not follow them.

" Q. How long after that did the fire occur at " Francisco Martin's house?

" Ans. They were firing there for about half an " hour, and then in order to find out who they " were I called out to them. I followed the road, " and when I got as far as the house of Martin I " saw it was on fire already, and then I asked " ' Who set that house on fire? ' and then the reply " was a blow.

" Q. Who struck the blow?

" Ans. I could not find out who it was, because " immediately afterwards it was from a poniard and " then I ran away home.

" Q. Were these people then present there?

" Ans. The people that came in the cart; I could " not know who they were.

" Q. Were these people residents of the town or " strangers?

" Ans. I had my eyes fixed on the fire and not on " the persons.

" Q. Were there many persons or few around " there that night?

" Ans. There were plenty.

" Q. Was it an usual or unusual number of people gathered there?

" Ans. There was about 16 or 20 or 30 in the barrio.

" By the Court:

" Q. You mean the people who lived in the barrio?

" Ans. The barrio has a thousand and odd people.

" No cross-examination."

Another witness, MANUEL PEÑAS ARRERO, called for the defendant, testified as follows (p. 68, fol. 90):

" I am a business man.

" Q. Where were you living in the month of " August, 1898?

" Ans. In the Coto Laurel.

" Q. Were you living there on August 19th?

" Ans. No, I was here in town then.

" Q. Were you in the Coto the night of that day?

" Ans. No, sir.

" Q. When did you leave there for Ponce?

" Ans. About eight or ten days previously.

" Q. What was the occasion of your leaving there " and coming to Ponce?

" Mr. Boerman: I object to that as it is immaterial " entirely.

" The Court: Let him state what he saw; he can- " not give any private reasons for what he did.

" Q. State, if you know, of any disorder by which " you were compelled to leave Coto?

" The Court: That is leading.

" Q. Why did you leave the Coto?

" Ans Because at that time there were bands of " seven or eight who went around the place.

" Q. Where were these bands operating?

" Ans. They were moving about from place to " place in the Coto.

" Q. What did they do?

" Ans. They came to my house—they were threat- " ening Spaniards—and said that by order of Gen " eral So and So we had to deliver to them all we " had.

" Q. Was anybody else compelled to leave the " Coto at that time, if you know?

" Ans. That I cannot tell.

" Q. Was any property of yours destroyed about " the 19th of August, 1898?

" Ans. All that I had.

" Q. How was it destroyed?

" Ans. As I discovered the day after, it was by " fire.

" The Court: That is excluded from the testimony " —what he heard.

" Q. Do you know of your own knowledge how " that property was lost?

" Ans. I have said that I knew the next day that " everything was burned up.

" Q. Did you see the remains of it when you went " back there the next day?

" The Court: I cannot go into that; it may have " been burned in some other way.

" CROSS-EXAMINATION:

" Q. Is it not a fact that at that time the State of " Porto Rico in all the barrios was the same as in " Coto, just as well as in the other parts?

" The Court: That is not competent. I cannot go " into the discussion of the condition of Porto Rico.

" Q. Is it not a fact that the state of all the bar- " rios in the vicinity was the same?

" Ans. Yes, the same as this.

" Q. And the state in Coto was not different " from the state in any other barrio?

" Ans. I did not leave the barrio except to come " here to Ponce."

JOSÉ JULIAN LEON, another witness called by the defendant, testified (p. 69, fol. 92):

" I am a merchant and live in the Coto Laurel.

" Q. Where did you live on the 19th of August, " 1898?

" Ans. In the same Coto Laurel.

" Q. Were you there on the day and night of " the 19th of August?

" Ans. Yes, at home.

" Q. Will you state what happened that night?

" Ans. About midnight I heard a cry of " Fire!"

" Q. Were there any strange people in the barrio
" that you saw?
" Ans. No, sir, the same as ever.
" Q. Do you know how the house of Mr. Fran-
" cisco Martin took fire?
" Ans. No, I do not know; I was living at a short
" distance from him.
" Q. What was the condition of the barrio that
" evening with reference to noise or excitement?
" Ans. I did not hear any.
" Q. Have you ever testified before about the cir-
" cumstances of that night?

" Mr. Boerman: I object to that; it is immaterial.
" The Court: He can prove he made other state-
" ments, and can impeach him by them.

" Q. Have you ever testified upon any other occa-
" sion about the circumstances of that night?
" Ans. I did declare, but it was to make known
" that when I heard the word 'fire' I saw the
" house of Francisco Martin afire, and about the
" individuals who helped me to carry provisions out
" into the yard.
" Q. Whose provisions do you refer to?
" Ans. To my provisions in my own establish-
" ment.
" Q. Why did you take those provisions out?

" The Court: That is objectionable.

" Q. Was there anything happening around your
" house that gave you an alarm?

" The Court: If that was after the fire began I do
" not think I can go into that.

" Q. Did you go into the house of Francisco Mar-
" tin a short time before the fire?
" Ans. No.
" Q. Were you never in the house of Francisco
" Martin?
" Ans. On that day no, but at several times be-
" fore. I had been living there about fourteen years."

After this evidence on behalf of the defendant the plaintiff called two witnesses, one *Luis Lopez* who testified (p. 71, fol. 93) that he resided in Coto Laurel. That he was a carpenter and had lived there from the year 1895.

" Q. Have you been living there since the month " of August, 1898?

" Ans. Yes.

" Q. Did you absent yourself at any time?

" Ans. No, sir.

" Q. Were you there during the whole month?

"Ans. Yes, all the month.

" Q. State what was the condition of the Coto dur- " ing that month so far as tranquility was con- " cerned?

" Ans. At the beginning, and when the troops " passed through there was some uneasiness, but " when they had passed everything was quiet " again.

" Q. When did the troops pass?

" Ans. They passed through there at the begin- " ning of the month and were in camp in the neigh- " borhood.

" CROSS-EXAMINATION:

" Q. Do you not know it to be a fact that there " was a number of unknown people who visited the " barrio of Coto very frequently during the month " of August, stealing and threatening people?

" Ans. No, sir.

" Q. You never saw anything of that kind?

" Ans. Nobody threatened me, nor did I see any- " body being threatened.

" Q. What was your business during the month " of August?

" Ans. I was employed there in a store.

" Q. By whom?

" Ans. By the Sucesion de Cerellez.

" Q. Where?

" Ans. In the Hacienda 'Ponceña.' I was living " in Coto.

" Q. Did you see the fire that night of the 19th of " August when the house of Francisco Martin was " burned?

" Ans. When I arrived there it was already " burned down, but still burning.

" Q Where did you come from at that time?

" Ans. I was sleeping there at Coto.

The other witness was Miguel Montenegro, a laborer now employed in Ponce. He testified (p. 72, fol. 95) that he lived in Coto Laurel before he came to Ponce four years. He lived there in the month of August, 1898, during the invasion. He lived there a whole month.

" Q. Tell what was the condition of the Coto so far " as tranquility was concerned during that month?

" Ans. The whole month was tranquil.

" Q. Did you see any disturbance, or anything " committed there?

" The Court: He says it was tranquil.

" CROSS-EXAMINATION:

" Q. And during all the month of August you " never heard the cry of 'Fire' in the Coto?

" Ans. No, sir; until the 29th of August, at night, " the next day I heard some shouts: it was from " 10 o'clock on.

" Q. What day was it that the house of Francisco " Martin burned?

" Ans. The 29th, or the morning of the 20th.

" Q. Was that the morning that you heard the " shouts of 'Fire,' the morning or the night that " the house of Francisco Martin burned?

" Ans. No, sir; the next day at 10 o'clock, between " 10 and 11.

" Q. How do you know it was the night of the " 29th?

" Mr. Boerman: I think he said the 20th.

" Q. How do you know that it was the night of " the 20th that that fire took place?

"Ans. Let me tell you now, I am out of my way; "it was on the 19th and the 20th.

"Q. Where were you that night?

"Ans. Sleeping at home.

"Q. Where is your home?

"Ans. About two cuerdas from the house of Pan- "cho Martin.

"Q. Were you working for Don Pancho then?

"Ans. No, sir; I was working for the hacienda.

"Q. Do you know whether any people took away "any provisions from the store of Don Pancho any "night before that?

"Ans. I do not know; I cannot say.

"Q. Do you know of your own knowledge "whether provisions were taken away from his "place?

"Ans. No, sir; I do not remember; I saw nothing "of that.

"Q. You say there was no riot or commotion at "all there at that time?

"Ans. No, sir."

This closed the testimony.

The charge of the Judge so far as it relates to this point was as follows (Record, p. 80, fols. 104, 105):

"Another defense presented by the answer is "that the loss was caused by invasion, or occurred "during invasion, war, riot, &c. I will read to "you a part of the condition of the policy relative "to this matter, although the entire policy and "all its conditions is before you as testimony. It "provides, 'this policy does not cover loss or dam- "age by fire happening during any invasion by "foreign enemy, during rebellion, insurrection, "riot, civil commotion, military or usurped power "or martial law within the country or locality "within which the property insured is situated, "unless proof be made to the satisfaction of the "directors that such loss or damage was not oc-

" casioned by or connected with, or occurred from a
" cause or causes independent of the existence of
" such invasion, foreign enemy, rebellion, insurrec-
" tion, riot, civil commotion, military or usurped
" power or martial law.'

"The defense mainly relied upon here is that this
" loss occured during an invasion, riot, civil com-
" motion, military or usurped power, or martial
" law. A fair construction of that condition in the
" opinion of the Court is that that must, in order
" to excuse this company from liability in case of
" loss of property by fire, that that invasion by
" foreign enemy, rebellion, insurrection, riot, civil
" commotion, military or usurped power or martial
" law, must have been occurring within the section
" of the country where this loss occurred, or within
" the locality, and within such a radius of country
" where the loss occurred that danger arose to
" property by reason of the existence of that rebel-
" lion, invasion, insurrection, civil commotion,
" military or usurped power, or martial law. And
" I further tell you, gentlemen, that if you believe
" from the evidence that this destruction of this
" property did not occur from any of these causes,
" and occurred from a cause independent of the ex-
" istence of any foreign enemy, rebellion, insurrec-
" tion, riot, civil commotion, military or usurped
" power or martial law, then you should find so far
" as this defense is concerned for the plaintiff in
" damages whatever you think may have been his
" loss. This is a reasonable construction, as the
" Court thinks, of this and these conditions of the
" policy. * * * if you believe from the testi-
" mony that this loss occurred during invasion, re-
" bellion, riot, civil commotion, and other states of
" case as set out in the policy existing in this local-
" ity where this store and real estate was located,
" or in that section of the country, and that it oc-
" curred by reason of the existence of that state of
" case, why then, if you believe it did occur from
" that state of case in that section where the loss

" occurred, and by reason of it, you would find for " the defendant."

To this part of the charge the defendant excepted as follows (Record, pp. 82, 83):

" Mr. Dexter: Defendant also excepts to that part " of the charge which states substantially as fol- " lows: 'A fair consideration of the condition (re- " ferring to the condition of the policy which is " contained, I think, in part 3, referring to the " invasion, riot, &c.) is, in order to excuse from " liability, that the invasion (and repeating the " other words in that connection) that the invasion, " foreign enemy, rebellion, insurrection, riot, civil " commotion, military or usurped power or " martial law must have been occurring in the " section of the country or the locality where the " fire occurred, and within such a radius of country " that danger arose by the existence of such in- " invasion,' and naming the other circumstances " referred to in the policy.

" The Court: I overrule that.

" Mr. Dexter takes an exception.

" Mr. Dexter: Defendant also wishes to except to " that part of the charge of the Court to the effect " that 'if you believe that the loss did not occur " from these causes.' The objection being that " defendant asks that the charge instruct the jury " that they shall find for the defendant if they find " that the loss occurred during the existence of any " of these conditions.

" The Court: This cause or any of them.

" Mr. Dexter: Defendant asks that the charge " be modified to this effect: 'If you believe that " the loss occurred during the existence of inva- " sion, foreign enemy, rebellion, insurrection, riot, " civil commotion, military or usurped power or " martial law then you will find for the defend- " ant.' In other words, not making that the " cause, but if it is shown that those circumstances " existed that then——

"The Court: The objection you make is, if that "is modified as you wish – but it does not fix any "locality or section of the country.

"Mr. Dexter: Your Honor has already passed "on that in this prior objection, but I refer now to "the other feature as to whether the fire should "prove to be the result of any of these conditions "mentioned which would be the cause. We object "to making——

"The Court: I have told the jury that if the fire "arose by reason of any of these causes existing in "that section or locality of the country.

"Mr. Dexter: That is the part defendant excepts "to.

"The Court: You may take an exception to "that. I understand you are claiming, for instance, "if the Germans had invaded San Juan and got into "San Juan, and if this property in this place had "been destroyed by a boy dropping a match, that "the Company would be released. The Court has "not that view."

The defendant was entitled to the charge requested by the plaintiff in error in modification of the foregoing as follows:

"If you believe that the loss occurred during the "existence of invasion, foreign enemy, rebellion, "insurrection, riot, civil commotion, military or "usurped power or martial law, then you will find "for the defendant." To the refusal the defendant excepted (Record, p. 83, fol. 110).

And the fifteenth assignment of error is good (Record, p. 25, fol. 39).

There was no evidence whatever of the fire being attributable to any other cause than the invasion, riot or civil commotion then existing in that part of Porto Rico. The town of Coto Laurel is within 5 kilometers or about $3\frac{1}{10}$ miles from Ponce (Record, p. 30, fol. 51). The American troops had been at Ponce since the 25th of July (Record, p. 62, fol.

83). At the request of the defendant in error made to the Commanding General a force of troops 30 or 40 strong had been sent down to protect his place (Record, p. 60, fol. 81). This fact was at first suppressed by the defendant in error in his testimony, and until other witnesses had testified to his conversation with General Wilson, he said nothing about it, and claimed that the condition of affairs in and about Coto was perfectly normal. Seeing that the fact of his request for military protection was known, he then admitted when recalled, and upon resumption of his cross-examination, these facts. His own testimony is sufficient to show that a state of war existed—an invasion; and the testimony of other witnesses in Coto was overwhelming, that on the 19th of August there was a commotion and disturbance in Coto, and that houses and property were burned. The fact that some witnesses were asleep and heard nothing is not contradictory of this; nor was there on the trial the slightest attempt to show that the fire was attributable to any other cause.

A fair construction of this condition in the policy is that where a state of invasion or martial law exists in the neighborhood where the fire was, the company is not liable for the loss by fire, unless there be some evidence that the fire was attributable to some other cause. The presumption created by the policy is that it was attributable to the invasion. It is not enough that there was no evidence as to any other cause, as was the fact here. The policy required that there should be affirmative evidence attributing the fire to some other cause. It may not be necessary to hold, in accordance with the literal interpretation of the condition, that the Directors must be satisfied that there was not some other cause. It may well be that, if there was proof of some other cause, the mere fact that the Directors were not satisfied by it would not be enough.

The case then was one where the evidence was undisputed of the existence of invasion in the very district of country where the property was situated and the main body of the invading troops was within three and a half miles of the property, and at the request of the owner of the property a detachment of soldiers was sent to the very place insured. The defendant's counsel might well have asked the Court to rule that a state of invasion did exist at the place where the property was, but the instruction asked was simply that if the jury found the fact of invasion, &c., then the plaintiff could not recover. This the plaintiff in error was entitled to upon the state of the proof.

So also the proof was very explicit that a mob existed at the very time and place of the fire, the only evidence to the contrary being that certain witnesses did not hear or see the evidences of a mob, some or all of whom were asleep at the time (Testimony of Maria Rodriguez, *supra*, p. 46; José Lario Roche, *supra*, p. 48).

The fourteenth assignment of error was also well taken on the ground stated therein, that it did not fairly give effect to the terms of the contract contained in the policy of insurance, and that the effect of the ruling was to narrow the application of the language of the policy and limit the defense of the plaintiff in error to proof that the loss was the direct result of one of those enumerated conditions or causes (Record, p. 24, fol. 39).

This ruling was calculated to injure the defendant with the jury. It threw the burden on the plaintiff in error to satisfy the jury that the fire occurred from some cause independent of the invasion, rebellion, riot, &c.

So, also, in the same connection, the remark volunteered by the Judge that he understood defendant's counsel to claim "that if the Germans had "invaded San Juan, and if this property in this "place had been destroyed by a boy dropping a "match, the company would be released," was

calculated to injure the defendant with the jury, and the sixteenth assignment of error is good (Record, p. 88, fol. 111; Record, p. 25, fol. 40).

## FOURTH POINT.

**The judgment below should be reversed and a new trial ordered, with costs to the plaintiff in error.**

WILLIAM G. CHOATE,
Of Counsel for Plaintiff in Error.

# Supreme Court of the United States.

No. 86.

THE ROYAL INSURANCE COMPANY,
Plaintiff in Error,

vs.

RUPERTO MARTIN, as Executor of the Will of Francisco Martin, Deceased,
Defendant in Error.

## BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

### First.

The suggestion that the reference to the Territories in the 35th Section of the Foraker Act may refer to the laws regulating appeals from the Territories of Alaska, Hawaii and Indian Territory, and not to the Territories generally in respect to which this subject is governed by the 15th Section of the Judiciary Act of 1891, has no merit.

The reference in the 35th Section could not well be held to apply to laws regulating the subject subsequently passed which were special in their character and related to particular territories, and this is true of Alaska and Hawaii. The reference is evidently to existing laws, and these

two laws were not then existing. As to the Indian Territory the law regulating appeals from its Supreme Court, if it was, as claimed, different from the regulation of appeals from other Territories, the law was special, applying to that Territory only. This statute would not answer to the description in the 35th Section of the Foraker Act that writs of error, &c., shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations, and in the same cases as from the Supreme Courts of the Territories of the United States. One Territory is not *the* Territories. Besides, if it be true, as argued for the defendant in error, that no appeal lies to the Supreme Court from the Territorial Court of the Indian Territory, then the act regulating appeals in case of that Territory cannot be the one referred to in the 35th Section of the Foraker Act, for that refers to some law which does allow appeals.

While it is true as a general thing that the *effect* of the Judiciary Act of 1891, made final in the Court of Appeals judgments in cases that did not involve federal questions, yet that is not the classification contained in the 6th and 15th sections of that act. The burden of the defendant's argument against the jurisdiction of this Court seems to be that this case, and cases like it, ought not to have been made appealable to this Court. But the Court has had occasion heretofore to call attention to the fact that the terms of the 15th and 6th sections of the Judiciary Act of 1891 are so explicit and unambiguous that the Court cannot say because a case arises which, if the attention of Congress had been specially called to it, would, it is believed, have been otherwise disposed of in regard to the Court to which it should be appealed, that that consideration in any way affects the question.

*Folsom* v. *U. S.*, 160 U. S., 127.

## Second.

**As to the defense of the transfer of the personal property to Martin Brothers.**

Inadvertently the recital of the terms of the 5th condition of the policy on the 25th page of the brief of the plaintiff in error is inaccurate. That recital follows the condition as given in the declaration (Record, p. 3, fol. 5). The exact language of the policy appears in the record, at page 34, folio 54, and it is accurately copied in the brief of plaintiff in error on page 2.

It is true that some courts have held where the condition is that the policy shall cease or be void in case of the sale or conveyance of the property, that this does not cover the case of a transfer by an assured to a firm consisting of himself and a new copartner or copartners, and that such a condition referring to the property insured, will not be broken by a sale or transfer of a part of the property. Such are the cases cited by the defendant in error.

*The Washington Fire Ins. Co. et al.*, vs. *Kelley*, 32 Md., 421.

*Scanlon* vs. *Union Fire Ins. Co. of Baltimore*, 4 Bissell, 511.

*Blackwell* vs. *Insurance Company*, 48 Ohio St. Rep., 533.

*Cowan* vs. *The Iowa State Ins. Co.*, 40 Iowa, 551.

This doctrine proceeds apparently upon the theory that such a clause is in the nature of a forfeiture and should be construed with great strictness, and if the transfer or alienation relied upon is any way different from what can properly be described as a mere sale or conveyance of the whole property to a third party, then, inasmuch as the company could have provided for such partial or modified transfer, it is to be deemed not to have

forbidden it. These cases have not passed, however, without challenge in other courts. In *Malley* vs. *Atlantic Fire and Marine Ins. Co.*, 51 Conn., 251, the Supreme Court of Connecticut says that the case of *Cowan* vs. *The Iowa State Ins. Co.*, 40 Iowa, is against the weight of reason and precedent. The point has never been passed upon in this Court. It is here open as an original question, and it is insisted on the part of the plaintiff in error that this construction is too strict, considering the purpose of the clause and the meritorious character of the defense that arises to an insurance company from the admission of a new partner or partners.

Looking to the reasons for the insertion of the clause, as stated by Mr. Justice Miller in the case cited in the plaintiff's principal brief, there is abundant ground for claiming that the transfer to a partnership of which the insured remains a member falls within the prohibition of this clause—that such a transfer to a firm is a transfer to another person within the meaning of the policy. Such a transaction brings the insurance company into relations with a stranger of whom it has no knowledge and with whom it never agreed to contract, which is the very evil intended to be guarded against, and it seems immaterial whether the original assured retains an interest in the partnership or not; the mischief intended to be guarded against is done. A clause of this character is not properly described as a forfeiture. It is a declaration on the part of the company that its contract is with a particular person, and that is insisted upon with its consequences, one of which is that they do not contract with other people under cover of contracting with him, and this is a perfectly legitimate position for the company to occupy with its customers, the contract being based on personal confidence. The books indeed are full of cases where, to defeat merely technical and unconscionable defenses on the part of insurance companies, the terms of the policy have been con-

strued with great strictness, but the question of construction as to any contract is, What is its reasonable meaning? And applying that rule, it is insisted on the part of the plaintiff in error that the courts have sometimes gone too far in the strictness of the construction of insurance policies from a failure to discriminate between meritorious and unconscionable grounds of defense against the payment of the policy.

But whatever decision this Court might reach upon this question as an original question the cases cited have no bearing, where, by the terms of the condition, not only a sale or conveyance but a change of title or interest is provided for. A transfer to a firm composed of the assured and another or others is held to be within the condition in such a case and to avoid the policy.

And such a provision including a change of title or interest is treated by the Courts as just and reasonable. Thus in *Germania F. Ins. Co.* v. *Home Ins. Co.*, 144 N. Y. 199, the Court says:

"The contract of insurance is peculiarly personal "in its nature, and the success of the business of "underwriting depends largely upon what is known "as the moral hazard.

"It is a well-established principle of the common "law that every man has the right to determine "with whom he will enter into contract obliga-"tions.

"An insurance company is induced to issue or "withhold its policy after carefully scrutinizing "the character of the applicant for insurance.

"It is of the utmost importance to the Company "to ascertain who is to be vested with the title and "possession of the property sought to be insured."

And in *Beggs* v. *Ins. Co.*, 88 No. Car., 141, the Court says of such clause (pp. 143-4):

"Such a stipulation as this, as being both reason-"able and just, has received the sanction of this

"Court in *Sossaman* v. *Pamlico Ins. Co.*, 78 N. C., "145. Indeed, being founded upon the idea of en- "listing the care and watchfulness of the insured "in the protection of the property by keeping un- "impaired his interest therein, it has been uni- "formly regarded as a conservative condition in "policies, which merited the support of the courts."

To the same effect is *Card* v. *Phœnix Ins. Co.*, 4 Mo. App., 424.

Cases in the Supreme Court of Iowa subsequent to the case of *Cowan* v. *State Ins. Co.*, 40 Iowa, 551, which is relied on by the defendant in error, distinguish that case on the ground that there was no provision in the policy in that case relating to a change of title or interest, but a provision merely in respect to a sale or conveyance which was held to mean a technical sale of the whole property.

*Hathaway* v. *State Ins. Co.*, 64 Ia., 229; s. c., 20 N. W. Rep., 164.

*Oldham* v. *Ins. Co.*, 90 Ia., 225; s. c., 57 N. W. Rep., 861.

*Jones* v. *Phœnix Ins. Co.*, 97 Ia., 275; s. c., 66 N. W. Rep., 169.

*Germania Fire Ins. Co.* v. *Home Ins. Co.*, 4 Misc. (N. Y.), 443, 445.

See also

May on Ins. (4th Ed.), § 279.

3 Joyce on Ins., §§ 2293–5, and note reviewing cases.

1 Biddle on Ins., § 224.

Elliott on Ins., § 273.

Fairly interpreted, the policy in suit does provide that a change of title or interest shall avoid the policy. The language is: "This policy ceases to be in force as to any property which shall pass from the insured to any other person otherwise than by due operation of law, unless," &c. The forms of the condition contained in the policies hereinbefore referred to have been the usual forms of American

policies. This fifth condition is the usual condition in English policies (Porter on Insurance, 2d Ed., p. 180). No English case has been found interpreting this condition. The Scotch case in which a condition almost identical with this was passed upon by a Scotch court, referred to by the defendant in error, does not aid in the decision of the question. In that case the policy insured the firm; the property described in the policy stood in the name of one of the partners for the benefit of the firm. A subsequent arrangement was made which, if it had been carried out, would have altered the relative interests of the partners in the property. It would not have introduced any stranger into the firm. If consummated the interest of one of the partners would have ceased. The Court found that the arrangement had not been consummated, and the relative interests of the parties were not changed at the time of the loss, but expressed an opinion that if it had been consummated the policy would not have been avoided. This is quite consistent with the cases in this country, which hold that a change in the relative amount of the interest among the assured, or the termination of the interest of one or more of the assured, does not amount to such a change of title or interest as is forbidden by such a clause.

The clause in question in the present case covers the case not only of a sale of the property to a stranger, but "the passing of any property in- "sured from the insured to any other person other- "wise than by due operation of law." What passes by due operation of law is not the property itself physically, like the passing of property sold from the vendor to the vendee by delivery, but a title or an interest, and the language, "any property hereby insured" is broad enough to cover any part of the property insured, whether it be a part divided in specie or an undivided interest. The condition is to be read as if the words were: "This policy ceases to be in force as to

any property hereby insured, an interest or title in which shall pass from the insured to any other person otherwise than by due operation of law, unless," &c. Cases, therefore, under American policies which forbid a sale or transfer of the property itself, are not in point in the interpretation of this clause. The clause was evidently designed for the purpose of protecting the company against interest to be acquired by any other person than the insured in the property.

Moreover, the peculiar facts in this case are such as to distinguish it from all the cases cited. In the ordinary case of a transfer by the assured to the firm the assured continues to be an active member of the firm. It may at least be said that the company has to some extent that care and supervision over the property on the part of the insured on which it relied as a matter of personal confidence in consenting to the contract. Although his copartners may have the like power he has power to protect the property against dangers which threaten it; but in the present case for all practical purposes this property was as if it were sold and conveyed to strangers. At the time of the insurance Francisco Martin the insured was carrying on the business and had his store and stock of goods at Coto, but before the loss he had retired from business and had become what is called a silent partner, and by the testimony of the plaintiff himself he, the plaintiff, a new party and a stranger, managed the business. The fact that the assured, Francisco Martin, retained an interest of $10,000 in the business means only that he left his money there or that the firm owed him that amount. As he was no longer an active partner he did not and could not exercise the control and supervision over the property which the company had stipulated for. Therefore, whatever may be said with regard to the propriety of decisions in other cases, upon the particular facts of this case this was a passing within the meaning of this condition of the property to other persons even to

the extent of giving them the possession. The transaction passed over the possession and the actual control of the property, and no authority is cited where, upon such a state of facts, any court has held that it was not a transfer to another person within the meaning of such a clause in the policy. The transfer was one fully within the meaning of the policy and effected the very mischief intended to be guarded against.

The suggestion in the brief of the defendant in error that it was incumbent on the plaintiff in error to produce a Spanish authority as to the construction in this regard of this policy, has no merit. From the fact that neither party produces such an authority the Court may infer that there are no such authorities, and if there are no such authorities—in other words, if there is no special law of Spain or of Porto Rico on that subject, then the Court must give to the written instrument such construction as it shall deem to be just and reasonable and in accordance with the intent of the parties.

## Third.

The construction put upon the third condition of the policy by the defendant in error, that the clause thereof allowing proof to be made to the satisfaction of the directors, that the loss or damage was not in fact caused by the invasion or riot is in the nature of a provision requiring preliminary proofs of invasion, riot, &c., as a condition of maintaining a claim under the policy, is not tenable.

There was indeed a special condition requiring notice of the fire and a particular account of the damage (Clause 6; Record, p. 34), which requirement would be waived on the authorities if the failure to pay was put upon an independent ground.

This clause attached to the provision about loss or damage by invasion simply makes it incumbent upon the insured if the loss happened during invasion or riot to prove that the fire arose from an independent cause. The substantial ground of defense is that the loss or damage happened during an invasion or riot. If no proof is made of any other cause, then this condition is in full force and operation. This case may be searched from beginning to end without disclosing any evidence whatever that the fire arose from any other cause than that attributable to the invasion or to riot. The proof of invasion was furnished by the plaintiff himself, as pointed out in the principal brief. It is idle to say that there could be a hostile army at Ponce with no invasion at Coto, within $3\frac{1}{10}$ miles. In fact, the plaintiff admitted existence of the invasion at Coto by requesting of the commanding general a detachment of troops to guard his place at Coto on the first coming of the invaders at Ponce. The reason for inserting such a clause as this in a policy is obvious. The presence of an invading army necessarily displaces the authority or the control of the existing government in the country or locality where the invading army is. The moral and legal forces which keep in check lawlessness within the territory are for the time being paralyzed, except so far as the invading force itself exerts the same influence. The old maxim, "*Silent leges inter arma*" expresses a profound truth. The presence of a foreign army for the time being suspends the operation and the influence for peace and order of the existing system of laws. This is so plain that even if there had been no special clause in the policy by the Spanish law in force in Porto Rico the underwriter would be released from the condition of his contract if the fire was caused by military forces or by mobs (Code of Commerce, p. 32 of our former brief). This tends to show the reasonableness of such a provision, and the provision in this policy went further than the Spanish law, but there is

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nothing in the Spanish law forbidding the provision here inserted that loss by fire during invasion shall not be deemed covered by the policy unless proof is made that it arose from an independent cause. There being then no proof whatever of any independent cause, upon the evidence the plaintiff in error was entitled to ask the Court, as it did, to charge the jury that if they were satisfied of the existence of the invasion or riot at the time of the fire the plaintiff could not recover. Nor is there anything in the record which shows that the Court did not understand this request. The Court insisted upon charging the jury only, that if the fire arose by reason of invasion or riot, then the plaintiff could not recover. The Court virtually ruled that this was the proper construction of the policy. The assumption of the defendant in error that the attention of the Court was not called to this precise point is unfounded. It is true that the bill of exceptions is not artificially drawn. Apparently the stenographer's minutes are just as they were printed, giving the colloquy between the Judge and the counsel, whereas the minutes should have been extended so as to present in a more intelligible way the rulings excepted to, &c. But this is mere matter of form; the substance is there. The Court is distinctly asked to charge a proposition which upon the proofs made, the plaintiff in error was entitled to have the Court charge, and there was a refusal. It is evident that Mr. Dexter did all that could be expected of a reasonable man to make the Court understand what his points were, and they are fairly stated and intelligible on the Record.

As to the point of an invasion, throughout the trial the Judge was insisting that the testimony should be narrowed down to the very place where the goods were situated. This the defendant's counsel contested, but so far as the introduction or rejection of testimony was concerned he seems to have failed to take exceptions. But the fact is admitted that the invading army was at Ponce, about

three miles away, connected with Coto by the military road, and that soldiers were detailed at the request of the plaintiff to protect his property. In the nature of the case, invasion is not and cannot be limited to the ground the soldiers tread upon. Its influence, which this clause in the policy was intended to guard against, extends to the surrounding country. Coto was easily within range of modern rifles and modern artillery, and it would be absurd to attempt to distinguish between Ponce and Coto in respect to the condition of an existing invasion.

As to the proof of riot at Coto on the night of the fire the evidence was also very strong, and there was no evidence offered of any other cause of the fire.

The instruction asked for was therefore proper and should have been given.

WM. G. CHOATE,
Of Counsel for Plaintiff in Error.

# Supreme Court of the United States

No. 86.

THE ROYAL INSURANCE COMPANY,
*Plaintiff in Error,*

*vs.*

RUPERTO MARTIN, as Executor of the Will of FRANCISCO MARTIN, Deceased,
*Defendant in Error.*

## Brief for Defendant in Error.

In his brief the counsel for plaintiff in error discusses three points or questions. Counsel for defendant in error will argue the negative of each such point. He will, therefore, attempt to establish the following three propositions:

1. This Court has no jurisdiction in this case.
2. The Court below did not err in its rulings with reference to the defense that the transfer of the personal property from Francisco Martin, the assured, to Martin Brothers voided the policy.
3. There was no error in the rulings of the Court below with reference to the ground of defense that the policy was void for the reason that the fire occurred during an invasion, riot, etc.

The corollary would be:

4. The writ of error should be dismissed for lack of jurisdiction, with costs to the defendant in error, or the judgment should be affirmed with costs to the defendant in error.

# POINTS.

## FIRST POINT.

### This Court has no jurisdiction in this case.

This action was brought by the plaintiff, Ruperto Martin, a citizen of Porto Rico, against the Royal Insurance Company, a corporation organized under the laws of England. The declaration was filed February 21, 1902.

Jurisdiction was conferred upon the District Court of Porto Rico by the Act of April 12, 1900 (31 Stat. at L., 77), commonly known as the Foraker Act, "To provide revenues and a civil government for Porto Rico," and more particularly by Section 34 of that Act, which provides that "The district court for said district (of Porto Rico) * * * shall have in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit court of the United States, and shall proceed therein in the same manner as a circuit court."

This Act was amended March 2, 1901 (31 Stat. at L., 953) so as to "extend to and embrace controversies where the parties or either of them are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the amount in dispute exceeds, exclusive of interest and costs, the sum or value of $1,000.00."

The declaration alleged a breach of contract of insurance, the non-payment of a loss covered by a policy issued by the defendant company. No question relating to the Constitution, treaties, or laws of the United States, or any other distinctly Federal question was involved in the controversy.

Judgment was rendered by the Court, upon the verdict of a jury, in favor of the plaintiff below for the sum of $7,623.00.

The Act of April 12, 1900, above referred to, by Section 35, provided further:

"That writs of error and appeals from the final decision "of the Supreme Court of Porto Rico and the District "Court of the United States shall be allowed and may be "taken to the Supreme Court of the United States in the "same manner and under the same regulations and in the "same cases as from the Supreme Courts of the Territories "of the United States; and such writs of error and appeals "shall be allowed in all cases where the Constitution of the "United States, or a treaty thereof, or an Act of Congress "is brought in question and the right claimed, thereunder "is denied; * * *."

No other legislation directly affecting the jurisdiction of the District Court of Porto Rico or the powers of this or of any other court to review the judgments and decrees of that court, has been had.

It will be noted that Section 35 provides that writs of error from the District Court of the United States for Porto Rico shall be allowed and may be taken to the Supreme Court of the United States in the same cases as from the Supreme Courts of the Territories. It is necessary, therefore, to determine whether or not an appeal could have been taken if this case had been before the supreme or highest courts of the Territories of the United States.

Appeals from cases in the highest courts in Arizona, Oklahoma and New Mexico are governed by Section 15 of the Judiciary Act of 1891 (26 Stat. at L., 826) which contains a general provision governing appeals from the Territories. Appeals from cases in the highest courts in Alaska, Hawaii and Indian Territory are governed for each territory by a special act. The Philippine Islands need not here be considered, as no provision for appeals was made for that

Territory until July 1, 1902. (Stat. at L., Vol. 32, part 2, Ch. 1369, p. 691.)

This Court would have no jurisdiction to review this case by writ of error if it came from the Territory of Alaska, for it is provided by the Act of June 6, 1900 (31 Stat. at L., Ch. 786, Sub. Ch., 51, pp. 321, 415) that writs of error may be taken from the District Court of that Territory directly to the Supreme Court in five classes of cases, enumerating the ones mentioned in Section 5 of the Act of March 3, 1891 (26 Stat. at L., 826), except that referring to the question of jurisdiction, in none of which the present case would be included, and provides that in all other cases where the amount involved or the value of the subject-matter exceeds $500.00 the appeal shall be to the Circuit Court of Appeals for the Ninth Circuit, and shall there be final (Sec. 505).

This Court would have no jurisdiction to review this case by writ of error if it came from the Territory of Hawaii, for the organic act of April 30, 1900, 31 Stat. at L., Ch. 339, Sec. 5, pp. 141, 158, gives no right of appeal to this Court unless it be inferred from the sentence of section 86 of that act which provides that the laws of the United States relating to appeals and writs of error, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. This case would not be included in the class of cases for which appeals would thus be provided. *Exparte* Wilder's Steamship Company, 183 U. S., 545.

This Court would have no jurisdiction to review this case by writ of error if it came from the Court of Appeals of the Indian Territory which, under the decision in The Steamer Coquitlan, 163 U. S., 346, must be considered the Supreme Court of that Territory. The Act of March 3, 1895, (28 Stat.

at L., Ch. 145, p. 698) constituting the Court of Appeals of that Territory, provides, by Section 11, that appeals and writs of error may be taken from said Court to the Circuit Court of Appeals of the Eighth Judiciary Circuit in the same manner and under the same regulations as appeals are taken to the Supreme Court of the United States. Nothing is said about appeals to the Supreme Court of the United States and it may be argued that the act operates as a repeal, *pro tanto*, of the earlier acts such as section 13 of the Judiciary Act of 1891 providing for such appeals. In that case there would be no appeal from the Court of Appeals of the Territory to the Supreme Court of the United States (Harless *vs.* U. S., 880 F. R., 97). At any rate the present case could not be appealed to this Court.

If Congress referred to the Supreme Courts of these three Territories when it provided in Section 35 of the Foraker Act that writs of error from the final decisions of the District court of Porto Rico may be taken to the Supreme Court of the United States in the same cases as from the Supreme Courts of the territories of the United States, then certainly this court has no jurisdiction to review the present case. It may well be argued that Congress, when framing this law, had in mind the provisions relating to the Territories of Hawaii and Alaska and Indian Territory, which are in a situation similar to that of Porto Rico, being occupied as they are by a population foreign in race, customs, language and laws. Like Hawaii, Porto Rico can be reached only by sea, as is practically the case with Alaska.

Reference is made to the above provisions relating to appeals from Alaska, Hawaii and Indian Territory, in order to show that the provisions of section 35 of the Foraker Act are not free from uncertainty as to their intent.

However, it is assumed that Congress had reference to the general provision contained in section 15 of the Judi-

ciary Act of March 3, 1891 (26 Stat. at L., 826), entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the authority of the courts of the United States, and for other purposes." This section reads as follows:

"Sec. 15. That the circuit court of appeal in cases in "which the judgments of the circuit courts of appeal "are made final by this act shall have the same appellate "jurisdiction, by writ of error or appeal, to review the judg- "ments, orders and decrees of the supreme courts of the "several Territories, as by this act they may have to review "the judgments, orders and decrees of the district court "and circuit courts; and for that purpose the several Ter- "ritories shall, by orders of the Supreme Court, to be made "from time to time, be assigned to particular circuits."

The district of Porto Rico has not been added to any judicial circuit.

Appeals and writs of error from the District and Circuit Courts are provided for in sections 5 and 6 of that act. They read as follows:

"Section 5. That appeals or writs of error may be taken "from the district courts or from the existing circuit courts "direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the court is in "issue; in such cases the question of jurisdiction alone shall "be certified to the Supreme Court from the court below for "decision.

"From the final sentances and decrees in prize causes.

"In cases of conviction of a capital or otherwise infamous "crime.

"In any case that involves the construction or applica- "tion of the Constitution of the United States.

"In any case in which the constitutionality of any law

"of the United States, or the validity or construction of "any treaty made under its authority, is drawn in question.

"In any case in which the constitution or law of a State "is claimed to be in contravention of the Constitution of "the United States.

"Nothing in this act shall effect the jurisdiction of the "Supreme Court in cases appealed from the highest court "of a State, nor the construction of the statute providing "for review of such cases."

"Section 6. That the circuit courts of appeals estab- "lished by this act shall exercise appellate jurisdiction to "review by appeal or by writ of error final decision in the "district court and the existing circuit courts in all cases "other than those provided for in the preceding section of "this act, unless otherwise provided by law, and the judg- "ments or decrees of the circuit courts of appeals shall be "final in all cases in which the jurisdiction is dependent "entirely upon the opposite parties to the suit or contro- "versy, being aliens and citizens of the United States or "citizens of different States; also in all cases arising under "the patent laws, under the revenue laws, and under the "criminal laws and in admiralty cases, excepting that in "every such subject within its appellate jurisdiction the "circuit court of appeals at any time may certify to the "Supreme Court of the United States any questions or "propositions of law concerning which it desires the instruc- "tion of that Court for its proper decision. And thereupon "the Supreme Court may either give its instruction on the "questions and propositions certified to it, which shall be "binding upon the circuit courts of appeals in such case, "or it may require that the whole record and cause may be "sent up to it for its consideration, and thereupon shall "decide the whole matter in controversy in the same man- "ner as if it had been brought there for review by writ of "error or appeal.

"And excepting also that in any such case as is herein-
" before made final in the circuit court of appeals it shall
" be competent for the Supreme Court to require by certi-
" orari or otherwise, any such case to be certified to the
" Supreme Court for its review and determination with the
" same power and authority in the case as if it had been
" carried by appeal or writ of error to the Supreme Court.

" In all cases not hereinbefore, in this section, made
" final there shall be of right an appeal or writ of error or
" review of the case by the Supreme Court of the United
" Sates where the matter in controversy shall exceed one
" thousand dollars besides costs. But no such appeal shall
" be taken or writ of error sued out unless within one year
" after the entry of the order, judgment, or decree sought to
" to be reviewed."

A careful perusal of this act makes it very plain that Congress intended to divide appealable questions into three broad classes:

I. One class of questions, the one set forth in Section 5, was deemed so important that an appeal was given directly from the Circuit and District Courts to the Supreme Court of the United States. It was fully understood that these appeals would go up, and should go up, to the Supreme Court eventually, and that an intermediary appeal would be merely a waste of time and expense.

II. In a second class of questions, set forth in Section 6 of the act, an appeal was allowed to the newly created Circuit Court of Appeals and the decrees and judgments of that Court were made final. The purpose of the act was to relieve the Supreme Court of the work which was crowding upon it more and more, and it was therefore provided that certain cases such as patent, revenue, admiralty and certain criminal cases, and cases in which the jurisdiction of the Circuit or District Court was dependent upon diver-

sity of citizenship, should be appealable no further than the Circuit Court of Appeals.

III. There remained a small class of cases, such for instance as cases arising under the copyright law, which could be appealed to the Circuit Court of Appeals and from there to the Supreme Court. This may be called the third class.

It will be noted that appeals in cases in which the jurisdiction of the United States courts depends upon a diversity of citizenship *only*, that is to say, cases *involving practically no Federal question whatsoever*, were by this act prevented from reaching the Supreme Court of the United States except by the extraordinary process of certiorari.

It is therefore evident that Congress did not intend to have cases involving no more than questions of general law go to the Supreme Court of the United States.

Sections 5 and 6 have received the consideration of this Court in a number of cases. In Borgmeyer *vs.* Idler, 159 U. S., 458, this Court said:

> " Where the jurisdiction of the United States Circuit
> " Court rests solely at the commencement of the suit
> " upon the ground of diverse citizenship, the judgment
> " of the Circuit Court of Appeals is final, although
> " other questions are subsequently raised."

To the same effect are:

John T. Voorhees *vs.* Noyes Mfg. Co., 151 U. S., 135;
Rouse *vs.* Letcher, 156 U. S., 47;
Carey *vs.* Houston & Texas Central Ry. Co., 161 U. S., 115;
Rouse *vs.* Hornsby, 161 U. S., 588:
Press Pub. Co., *vs.* Monroe, 164 U. S., 105;
*Exparte* Jones, 164 U. S., 691.

This brings us to the consideration of Section 15 of the Act relating to appeals from Territories. Here appeals were divided into two general classes.

One class embraces the cases involving questions referred to in Section 5 of the Act, that is, purely Federal questions, and such other cases with regard to which Section 6 of the Act provides that appeals shall not be final in the Court of Appeals. This class was made appealable directly to the Supreme Court.

The second class embraces all such cases in which if brought in a Circuit Court or District Court, the judgment of the Court of Appeals would be final. This class was made appealable to the Circuit Court of Appeals and no further.

In Shute *vs.* Keyser, 149 U. S., 649, it was decided that an appeal or writ of error lies to the Supreme Court from the judgments or decrees of the Supreme Courts of the Territories, except in cases where the judgments of the Circuit Courts of Appeal are made final.

It is evident that Congress, having in mind the purpose for which the Act was passed, namely, to relieve the Supreme Court of the tremendous burden of deciding all the appeals which would have come to it under the former acts, intended to provide that cases in the Territorial Courts involving only questions of general law, and patent, revenue, admiralty and criminal cases, should be appealable to the Circuit Court of Appeals and no further; while cases involving Federal questions, such as those enumerated in Section 5, and certain cases such as copyright cases, not within the exceptions of Section 6, were made appealable directly to the Supreme Court. In other words, the cases involved in the first and third classes in the constitutional courts above mentioned were thrown into one class, and made appealable directly to the Supreme Court, and all the cases involved in the second class above mentioned were put into another class and made appealable to the Circuit Court of Appeals and no further.

It is, therefore, urged that if the present case, which belongs to the second class, involving no Federal question, had been brought in one of the courts of Oklahoma, Arizona, or New Mexico an appeal would have had to go to the proper Circuit Court of Appeals, and that the Supreme Court would have had no jurisdiction except by certiorari.

It has been argued by counsel for plaintiff in error that the words of Section 6 of the Act which established the Circuit Courts of Appeals:

"In all cases in which the jurisdiction is dependent "entirely upon the opposite parties to the suit or contro- "versy, being aliens and citizens of the United States and "citizens of different States"

ought not to apply to appeals from the Territories because the jurisdiction of the courts there does not depend upon diversity of citizenship. At first blush this contention may seem to be justified, but it is submitted that a careful study of the entire Act discloses that Congress intended to make cases in which no Federal question is raised, that is to say cases involving only questions of general law, appealable to the Circuit Court of Appeals, and in no instance to the Supreme Court except by certiorari.

The proper method of construing an act of Congress is to try to ascertain the intent of Congress as evidenced by the entire act. "The whole and every part of the statute must be considered in fixing the meaning of the parts." (Co. Litt. 381 a.) Courts may also, "with perfect propriety, in construing a statute, recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the meaning of particular provisions in it." (United States *vs.* Union Pacific R. R. Co., 91 U. S., 72.)

Congress is compelled to clothe its intent in words, but words are but the vehicle of expressing the intent, and

should never be given a construction which violates such intent. "It is an established rule in the exposition of " statutes that the intention of the lawgiver is to be deduced " from a view of the whole and of every part of the statute " to be taken and compared together. The real intention " when actually ascertained, will always prevail over the " literal." (1 Kent's Com. 162, cited in People *vs.* Draper, " 15 N. Y., 532.)

The history of the efforts to relieve the calendar of the Supreme Court of its accumulation of cases threatening to swamp the court and to destroy its utility is too well known to need recounting here. When Congress finally grappled with the problem it solved it, as shown by the Act of 1891, by making a certain well defined class of cases appealable first to the new interappellate court before permitting their consideration by the Supreme Court, and making another certain well defined class of cases appealable to the new interappellate court and no further. The latter class of cases is set out in Section 6 of the Act of 1891, and comprises patent, revenue, admiralty and certain criminal cases, and practically all civil cases involving no Federal questions. The language of Section 6 is in the words of a portion of Article III, Section 2, of the Constitution, which enumerates the cases to which the judicial power of the United States shall extend. It was the best, and perhaps the only way in which Congress could express its intent to have these cases, and especially those involving no Federal questions, go no further than the new Circuit Court of Appeals. It is submitted that this intent is clear, plain and unmistakable.

McLish *vs.* Roff, 141 U. S., 661, 666:

" It is a matter of public history, and is manifest " on the face of that act, that its primary object was to " facilitate the prompt disposition off cases in the Su-

" preme Court and to relieve it of the enormous over
" burden of suits and cases resulting from the rapid
" growth of the country and the steady increase of its
" litigations. * * * It then provides for the
" distribution of the entire appellate jurisdiction of our
" national judicial system between the Supreme Court
" of the United States and the Circuit Court of
" Appeals, therein established, by designating the
" classes of cases in respect of which each of those two
" courts shall respectively have final jurisdiction."

By Section 15 of the Act of 1891 Congress has provided that in the same cases in which the judgment of the Circuit Court of Appeals is made final by this Act such court shall have final appellate jurisdiction in cases coming from the Territories. The intent is clear. Admiralty, patent, revenue and certain criminal cases again go to the Circuit Court of Appeals, as do also the cases involving questions of general law but not Federal questions. A certain concession is made to the Territories, in that certain appeals, those not referred to in Section 6 as made final in the Circuit Court of Appeals, such as appeals in copyright cases, go directly to the Supreme Court. This provision was made for the obvious reason that there were appellate courts in the Territories already, and that if the same rule were applied to this class of cases as was applied in the Constitutional courts, great hardship would result, because of the possibility of three appeals.

The words "cases in which the judgments of the circuit courts of appeals are made final by this Act," in Section 15, import into that section *all* such cases specified in Section 6. Counsel for plaintiff in error argues that the words of Section 6 "cases in which the jurisdiction is dependent " entirely upon the opposite parties to the suit or controversy " being aliens and citizens of the United States or citizens of

"different States" mean nothing when read in connection with Section 15, as the jurisdiction of territorial courts does not depend upon diversity of citizenship. But they must be held to mean something, rather than nothing, as they are clearly imported into Section 15 by the words above cited. This Court, and other courts, have always imported them into Section 15 when they have had occasion to consider this section. When the words of Section 6 are read in connection with Article III, Section 2, of the Constitution, it is evident that Congress intended by them to say "cases of general law involving no Federal question." Importing this reading of the words into Section 15 we find that the Supreme Court has been relieved by it of all "cases of general law involving no Federal question." *Thus, and thus only,* does the Judiciary Act of 1891 disclose a complete and harmonious system of appellate jurisdiction.

The following cases are the ones referred to as showing that the Courts have read the "diversity of citizenship" clause of Section 6 into Section 15.

The Circuit Court of Appeals for the Eighth Circuit in Union Central Life Insurance Company *vs.* Champlain, 116 F. R., 858, 859, in its opinion in a case coming to it by appeal from the Supreme Court of the Territory of Oklahoma, cited Sections 15 and 6 and said:

> "The jurisdiction in this case is not dependent upon
> " the opposite parties to the suit or controversy. *It*
> " *does not appear from the record that these parties are*
> " *aliens on the one side and citizens of the United States on*
> " *the other, or that they are citizens of different States.*
> " This is not a case arising under the patent laws,
> " the revenue laws, or the criminal laws, nor is it an
> " admirality case. *Hence* it does not fall within
> " the jurisdiction of this Court."

In Aztec Mining Company *vs.* Ripley, 53 F. R., 7, the Court of Appeals for the Eighth Circuit said:

> " The case at bar does not come within any one of " the classes wherein the judgment of this Court is " declared to be a finality. It is not a case in admir- " ality, nor does it arise under the criminal, revenue, " or patent laws of the United States, *nor is it a case* " *between aliens and citizens of the United States* or citi- " zens of different States, and therefore it does not " belong to any of the classes of cases in which " that Court is clothed with appellate jurisdiction."

This case was appealed to the Supreme Court of the United States. In its opinion reported in Aztec Mining Company *vs.* Ripley, 151 U. S., 179, this Court, speaking by Chief Justice Fuller, said:

> " By the 15th Section of the Judiciary Act of March " 3, 1891, the Circuit Courts of Appeals in cases in " which their judgments were made final by the Act " were empowered to exercise appellate jurisdiction over " the judgments, orders and decrees of the Supreme " Courts of the several Territories; but as this case is " not a case in admiralty, nor a case arising under the " criminal, revenue, or patent laws of the United States, " *nor a case between aliens and citizens of the United* " *States, or between citizens of different States, it does not* " *belong to either of the classes defined by Section 6 of that* " *Act*, as cases in which the judgments or decrees of the " Circuit Courts of Appeals should be final, and there- " fore the Circuit Court of Appeals for the Eighth Cir- " cuit properly declined to take jurisdiction."

In Folsom *vs.* U. S., 160 U. S., 121, this Court said:

> " The 15th Section confers appellate jurisdiction on " the Circuit Courts of Appeals to review the judgments " of the Supreme Courts of the Territories, but it is in " terms *the same appellate jurisdiction as conferred by the* " *6th Section* in respect of the judgments and decrees of

" District and Circuit Courts, *and this being so, is lim-*
" *ited to those cases in which, if decided by the District and*
"*Circuit Courts, the judgments of the Circuit Courts of*
" *Appeals would be final.*"

In Shute *vs.* Keyser, 149 U. S., 649, this Court said:

" An appeal or writ of error lies to this Court from
" the judgments or decrees of the Supreme Courts of
" the Territories except in cases where the judgment of
" the Circuit Courts of Appeals is made final."

The above citations show also that this Court has no jurisdiction on writ of error in cases in which the Court of Appeals has final jurisdiction. Therefore, the mere fact that there is no Circuit Court of Appeals competent to take jurisdiction of the present appeal would not give this Court jurisdiction.

We now come to the consideration of section 35 of the Foraker Act which defines the jurisdiction of the Supreme Court in writs of error and appeals coming from the courts of Porto Rico. For the sake of convenience, the section is here reprinted:

" Sec. 35. That writs of error and appeals from the final
" decisions of the Supreme Court of Porto Rico and the
" District Court of the United States shall be allowed and
" may be taken to the Supreme Court of the United States
" in the same manner and under the same regulations and
" in the same cases as from the Supreme Courts of the Terri-
" tories of the United States, and such writs of error and
" appeals shall be allowed in all cases where the Constitution
" of the United States, or a treaty thereof, or an act of Con-
" gress is brought in question and the right claimed there-
" under is denied; and the Supreme and District Courts of
" Porto Rico and the respective judges thereof may grant
" writs of habeas corpus in all cases in which the same are

" grantable by the judges of the District and Circuit Courts " of the United States. All such proceedings in the " Supreme Court of the United States shall be conducted in " the English language."

As has already been shown, it is not clear which Territories of the United States were referred to in this section, and it has been shown that Congress may possibly have intended to put Porto Rico into a class with the other Territories more similarly situated as regards distance from the United States by sea, or an alien population, or both, namely: Hawaii, Alaska, and Indian Territory. As this case could not have been appealed from Hawaii, Alaska, or Indian Territory, this Court would under this construction of this section have no jurisdiction to hear the present case. If, however, this clause is construed to mean that Congress intended to allow any writ of error or appeal which could have been taken from any court in any Territory, then this Court has no jurisdiction, as it has been shown that it would have had no jurisdiction in a similar case arising in Arizona, New Mexico, or Oklahoma.

It was undoubtedly the intent of Congress to provide a United States Court in Porto Rico for the convenience of American citizens and of aliens who would have to bring suit there. But it was also undoubtedly the intent of Congress not to burden the Supreme Court with cases like the present, involving no Federal question, in which this Court would be compelled to deal with a jurisprudence entirely unfamiliar and to decide cases which, arising as they do under Spanish law, would involve constructions of law and of contracts for which no cases ever decided in the United States could form a legal precedent. If cases like the present are to be decided by this Court, this Court would have to take judicial notice of foreign laws and decisions which, under ordinary circumstances, would

have to be proved, and which as a matter of fact are not accessible in this country. It certainly never was the intent of Congress to force this Court to read decisions of the Supreme Court in Madrid written in the Spanish language, and to construe the law of insurance, partnership, or of the construction of contracts in accordance with the Spanish or Porto Rican laws and decisions.

It is, therefore, respectfully submitted that this Court has no jurisdiction to determine the issues attempted to be raised by the writ of error.

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If it be admitted for the sake of argument that the construction here placed upon Section 15 of the Judiciary Act of 1891 be incorrect, this Court has nevertheless no jurisdiction to hear this case. The case is substantially one brought by a citizen of the United States against an alien.

It is admitted that a citizen of Porto Rico is not a citizen of the United States, but on the other hand he is not an alien, so that although this case would, strictly speaking, not be one between a citizen of the United States and an alien, it would on the other hand, not be one between an alien and an alien.

[Porto Rico is not a foreign country. (De Lima *vs.* Bidwell, 182 U. S., 198, 200; Fourteen Diamond Rings *vs.* U. S., 183 U. S., 176, 179.) "An alien means nothing more than a citizen or subject of a foreign state." (Milne *vs.* Huber, 3 McLean, 212, 17 F. C., 405, 406).]

Such an anomalous position has not been provided for directly by the Judiciary Act of March 3, 1891, but light is shed upon the position of citizens of Porto Rico by the 7th section of the Foraker Act, which provides:

"That all inhabitants continuing to reside therein (Porto "Rico) who were Spanish subjects on the eleventh day of

" April, eighteen hundred and ninety-nine, and then re-
" sided in Porto Rico, and their children born subsequent
" thereto, shall be deemed and held to be citizens of Porto
" Rico, and as such entitled to the protection of the United
" States, except such as shall have elected to preserve
" their allegiance to the Crown of Spain on or before the
" eleventh day of April, nineteen hundred, in accordance
" with the provisions of the treaty of peace between the
" United States and Spain entered into on the eleventh day
" of April, eighteen hundred and ninety-nine; and they,
" together with such citizens of the United States as may
" reside in Porto Rico, shall constitute a body politic under
" the name of The People of Porto Rico, with governmental
" powers as hereinafter conferred, and with power to sue and
" be sued as such."

This provision clearly shows that Congress, by making the " People of Porto Rico " consist of citizens of the United States and citizens of Porto Rico, intended to put citizens of Porto Rico on a par with citizens of the United States. If, therefore, a citizen of Porto Rico must under the terms of the Judiciary Act of March 3, 1891, be placed into the category of an alien or the category of a citizen of the United States, he must be placed into the latter.

The District Court of Porto Rico is not a constitutional court, but a legislative one, and the Act of Congress creating it must be construed not with reference to the Constitutional provision relating to United States courts, but with reference to other legislative provisions of Congress, such as the 7th Section of the Foraker Act, above cited.

This case, if brought by a citizen against an alien in a United States Circuit Court would not be appealable to this Court, as the entire jurisdiction on appeal or writ of error would be vested in the Circuit Court of Appeals.

If therefore this case had been brought by a citizen against an alien in Arizona, this Court would have had no jurisdiction on appeal as such jurisdiction would have been vested in the Circuit Court of Appeals by Section 15 of the Judiciary Act of 1891 which provides that "the Circuit Court of Appeals *in cases* in which the judgments of the Circuit Court of Appeals are made final by this Act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this Act they may have to review the judgments, orders, and decrees of the District Court and Circuit Courts."

That this construction of the Judiciary Act of 1891 is not unfounded is shown by the cases cited on pages 14–16 of this brief and especially by the dictum of Chief Justice Fuller in Aztec Mining Co. *vs.* Ripley, 151 U. S., 179:

> " By the 15th Section of the Judiciary Act of March
> " 3, 1891, the Circuit Courts of Appeals in cases in
> " which their judgments were made final by the Act
> " were empowered to exercise appellate jurisdiction
> " over the judgments, orders and decrees of the Supreme
> " Courts of the several Territories; but as this case is
> " not a case in admiralty, nor a case arising under the
> " criminal, revenue, or patent laws of the United
> " States, *nor a case between aliens and citizens of the*
> " *United States, or between citizens of different States, it*
> " *does not belong to either of the classes defined by Section*
> " *6 of that Act,* as cases in which the judgments or
> " decrees of the Circuit Courts of Appeals should be
> " final, and therefore the Circuit Court of Appeals for
> " the Eighth Circuit properly declined to take juris-
> " diction."

Should this construction of the Judiciary Act of 1891 be adopted by this Court, the argument that this case was intended by Congress to be placed into the same category with those in which a citizen of the United States sues an

alien, is strengthened by showing to what absurdity a contrary view would lead.

If an alien sued a citizen of the United States in the District Court of Porto Rico, the citizen of the United States would have no appeal to the Supreme Court of the United States, whereas, if the same alien sued a citizen of Porto Rico, such citizen would have the right to appeal.

Congress could never have intended to deprive a United States citizen of his right to an appeal and in the same breath confer it upon a citizen of Porto Rico.

> Lau Ow Bew *vs.* U. S., 144 U. S., 47:
> " Nothing is better settled than that statutes should
> " receive a sensible construction, such as will effectuate
> " the legislative intention and, if possible, so as to avoid
> " an unjust or an absurd conclusion."

It is therefore respectfully submitted that this Court has no jurisdiction to determine the questions submitted by the writ of error.

## SECOND POINT.

**The Court did not err in its rulings with reference to the defense that the transfer of the personal property covered by the policy from Francisco Martin, the assured, to Martin Brothers voided the policy.**

The plaintiff in error urges that the facts fail to show any right in the defendant in error to maintain an action to recover for the loss of the personal property, it having been established that the defendant in error, " Francisco Martin, to whom the policy had been originally issued, had surrendered the property to a firm or society of which he was only a sleeping or silent partner."

As regards the building, the testimony of the witness

Vasquez is to the effect that in 1898 it was the property of the testator (Rec., p. 31, fol. 51). No question is raised as to the right to recover for its loss.

With regard to the provisions and merchandise, the same witness testified (Rec., p. 31, fol. 51), that the father had an interest therein as a silent partner; further (Rec., p. 43, fol. 63), that he was a silent partner of the firm of Martin Bros. & Company, and that his interest in the partnership was $10,000; and further (Rec., p. 45, fol. 64) that in 1897 he had turned over his business to this firm; and further (Rec., p. 44, fol. 63) that the policy was continued in the father's name for the benefit of the firm. The insurance on the stock was £900, or about $4,400 (Policy, Rec., p. 32, fol. 52).

The question arises, therefore, whether the turning over of the business, or of the stock of goods, to the firm of which the insured was a silent partner, was such a transfer as came within the following condition of the policy, and thus made the policy void:

"This policy ceases to be in force as to any property "hereby insured which shall pass from the insured to "any other person otherwise than by due operation of "law, unless notice thereof be given to the company, "and the subsistence of the insurance in favor of such "other person be declared by a memorandum endorsed "thereon by, or on behalf of the company." (Policy, Rec., p. 34, fol. 54.)

By his 17th assignment, the plaintiff in error urges as error the refusal of the judge to instruct the jury "that if "the jury believes from the evidence that if at the time of "the fire, or prior thereto, the title to the stock of goods "which had been insured had passed out of Francisco Martin "and into another person, or other persons, the plaintiff "herein could not recover."

The law and decisions in the States of the Union on this point are very conflicting as a perusal of the books will show. This Court cannot therefore decide the question upon the authority of the decisions of any State or group of States. It becomes imperative to know the *lex loci contractus*, to wit, that of Porto Rico.

> "The general principle adopted by civilized nations
> "is that the nature, validity, and interpretation of
> "contracts are to be governed by the law of the coun-
> "try where the contracts are made, or are to be per-
> "formed." (Bank of the United States *vs.* Donnally,
> "8 Pet. 361, 372.)

No Spanish laws or decisions are submitted by counsel for plaintiff in error, so that no opportunity is given this Court to arrive at a correct conclusion on this important point. This Court cannot decide this question because it cannot be presumed to know the Spanish laws and decisions on the subject of partnership, fire insurance and construction of contracts.

For the sake of argument, however, this fatal defect will be waived for the present, and the question will be argued as a question of American law.

The reason for forbidding alienation of the insured property is twofold. The company desires to have the insured retain an interest in the policy because the Company has faith in the personal character of the insured, and the company also desires the insured to retain no less an interest in the goods than the amount of the insurance. As was said in Ayres *vs.* Hartford Ins. Co., 17 Iowa, 176:

> "The object of the Insurance Company by this
> "clause [forbidding transfer or change of title] is, that
> "the interest shall not change so that the assured shall
> "have a greater temptation or motive to burn the prop-
> "erty, or lose interest and watchfulness in guarding
> "and preserving it from destruction by fire."

In the present case the insured retained an interest of $10,000.00 in a business the only tangible assets of which were a stock of goods insured at $4,400. The reason for the rule thus failing, the rule itself fails.

It will be found that the majority of decisions hold that a transfer of insured goods to a partnership of which the insured is a member is not an alienation and does not void the policy.

Biddle on Insurance, Vol. 1, page 199:

> " But to avoid on the ground of alienation simple " the whole title must be parted with; for an alienation " of a part of the property, or a diminution in interest " of the insured will not avoid, the retention of a legal " or equitable title being sufficient interest."

The Washington Fire Insurance Company et al. *vs.* Kelley, 32 Md., 421, 434:

> "' If the property shall be sold or conveyed, or if " this policy shall be assigned, without the consent of " the company obtained in writing thereon, then this " policy shall be null and void.' * * *
>
> " The provision in the policy of the Washington " Fire Insurance Company against the sale or convey- " ance of the property insured, and against the assign- " ment of the policy without the consent of the insurers, " as it imposes a restriction upon the right of disposing " of the property, should be construed as any other " contract with like provision, with strictness, and noth- " ing less than the absolute sale or conveyance of the " property, with all the usual legal ingredients to con- " stitute the transaction as such, or similarly the com- " plete assignment of the policy, can be considered as " sufficient to avoid the policy on that account. Lazarus " *vs.* Commonwealth Ins. Co., 5 Pick., 76 to 82."

John Scanlon *vs.* The Union Fire Insurance Company of Baltimore, Md., 4 Bissell, 511, 512 (Circuit Court, Northern District of Illinois, March 3, 1869):

"Action upon insurance policy for $2,500, dated "September 17, 1867. At the time of the issuing of "the policy, the plaintiff was admitted to be the owner "of the property insured, but on the 11th day of Jan- "uary, 1868, and previous to the fire, he formed a "co-partnership with two other parties, and the property "insured was put in as partnership assets. The com- "pany claimed that this vitiated the whole policy un- "der the clause providing that, 'if the said property "shall be sold or conveyed, or if this policy shall be "assigned without the consent of the company ob- "tained in writing thereon, then and in every such case, "this policy shall be null and void.'

"Drummond, J., charged the jury as follows: "The question is whether there was, within the meaning "of this clause in the policy, a sale or conveyance of "the property, in such a way as to render it void.

"It is to be observed that the language of this con- "dition is general, 'that if the said property shall "be sold or conveyed,' etc. It is not that if the pro- "perty or any part of it, or any undivided interest in "it, shall be sold or conveyed, the policy shall be void; "it is not that if there is any change in the condition "of the property, or in the interest of the plaintiff, the "policy shall be void, but simply if the property shall "be sold or conveyed. The question is, whether the "true construction of this clause is not that, in order "to vitiate the policy it is essential that the whole of "the interest of the insured in the property shall be "sold or conveyed; and such, I think, is the true con- "struction of the condition. In order to avoid the "policy, he must sell the whole of his interest in the "property, and so long as he holds an interest in the "property the policy is binding. It was competent "for the insurers to declare that if a part of it were "sold, that should avoid the policy. It was also com-

" petent for them to declare that if there was any " change in the condition or title of the property, that " the policy would be void ; but that is not this condi- " tion. Therefore, I think the policy covers whatever " interest Scanlon owned in the property insured after " he entered into the articles of co-partnership, and at " the time of the loss. It is for you to determine what " that interest was."

Blackwell *vs.* Insurance Company, 48 Ohio State Reports, 533, 540:

" It is the policy of this court to strictly construe " those clauses in insurance policies which forfeit the " indemnity provided for the assured. West *et al. vs.* " The Citizens Insurance Company, 27 Ohio St., 1. " In this case, on page 10, Johnson, J., refers with " approval and in the following language to the views " on the subject contained on page 74 of May on Insur- " ance: ' Exceptions in a policy should be strictly con- " strued, and where there are two interpretations equal- " ly fair, that which gives the greater indemnity should " prevail.' And on page 13 (27 Ohio St.) the same " learned jurist says: 'Stipulations in a contract pro- " viding for disabilities or forfeitures, are to receive, " when the intent is doubtful, a strict construction " against those for whose benefit they are introduced.'

" Let us recur to the exact words of forfeiture as they " are set forth in the defendant's answer.

" 'If * * * said assured should sell or transfer " the property thereto insured, that said policy should " become null and void.' It was competent for the " policy to provide, expressly, that a sale of a part of " the property or of an interest therein should avoid " the policy; this they did not do. The absence of " specific provision to that effect when it could have " been so easily inserted, together with the rule before " referred to that conditions which defeat a policy " should be construed strictly against the forfeiture, " leads us to hold that a sale of the entire interest of " the property insured was necessary to avoid the " policy.

"In a strict legal sense, perhaps, where the one "engaged in business alone, takes a partner into his "business, or a firm receives a new member, or a mem- "ber goes out, the transaction results in the formation "of a new concern, accompanied by a sale or transfer "of all the property of the old concern to the new one; "but it is at least doubtful whether this strict legal "result is contemplated by the business world gener- "ally. That the parties in the case before us intended "the policy should be avoided in case the assured "received a partner into his business is uncertain; that "the plaintiff understood the transaction to be a sale of "an undivided half of the property and business to "Horman rather than a sale of the whole of it to a "firm composed of himself and Horman is quite prob- "able. It was competent for the parties to provide in "unambiguous terms that, if the assured received into "his business, without the consent of the insurers, a "partner, the policy should become void. This was "not done, and we think the principles already "announced require us to hold that the sale and trans- "fer resulting from the reception of a partner did not "avoid the policy.

"Notwithstanding the transaction the plaintiff re- "tained a substantial and insurable interest in the "property covered by the policy, while to avoid the "policy on account of the provision against alienation "it should have divested him of his entire interest."

Cowan *vs.* The Iowa State Insurance Company, 40 Iowa, 551, 552:

"'When any property insured in this company shall "'be alienated by sale or transfer, the policy thereon "'shall be void.' * * *

"It is then alleged that the plaintiff violated this "condition by the sale, alienation and transfer of all "the insured property to 'the firm of Cowan & Haskins, "a co-partnership composed of the plaintiff, Samuel "Cowan and Omar Haskins,' and that the goods in-

" sured were, at the time of the loss, the property of " that firm.

" A demurrer to this count of the petition, (*sic.*) on the " ground that it does not show an alienation or " transfer of all the property, but shows that plaintiff " still retained an insurable interest therein, which " was covered by the policy, was sustained. * * *

" Nothing less than a transfer of the property insured " whereby plaintiff would part with all his interest " therein, would operate to defeat the policy under the " condition against alienation, pleaded by defendant. " As long as plaintiff retained an insurable interest in " the property the policy attached thereto and pro- " tected plaintiff to the extent of his interest. May on " Insurance, pp. 463, 381, pp. 303, 278; Hitchcock *vs.* " N. W. Ins. Co., 26 N. Y., 68; West Branch Ins. Co. *vs.* " Helfenstein, 40 Pa. St., 289; Sherman *vs.* Niagara " Fire Ins. Co., 2 Sweeney, 470; Fernandey *vs.* Great " Western Ins. Co., 3 Robertson, 457; Hoffman *vs.* " Place, 32 N. Y., 405."

" From the judgment of the court upon the demurer, " the defendant appeals. The rule is based upon " sound reason and the true construction of the clause " in question, which neither in its language nor spirit, " is intended to deprive the insured of the right to dis- " pose of a part of the property by sale or otherwise. " This would operate as a restraint upon trade and the " free sale and transfer of property to which business " men who must enter into these contracts of insur- " ance, would never submit. It is not admitted for " the protection of the underwriters, and we have never " heard of a construction giving such an effect to a " condition against alienation. The condition of the " policy before us declares that the instrument shall be " void upon the alienation of the property insured, not " upon the alienation of a part of it.

" In our judgment the same reasons will support " the view that the transfer of an interest in the prop- " erty to a partner, which is shown by the answer, " will also fail under the condition in question, to

" defeat plaintiff's right to recover. As long as the " insured owns the property or a part of it, or an in- " terest in it that is insurable, the policy during its " life covers such a part or interest. As the condition " cannot be construed into a contract against a sale " of a part of the property, neither can it be re- " garded as an undertaking on the part of the assured " not to dispose of an interest in it. These views are " based upon the consideration that no increase of risk " is wrought by the sale or transfer of a part of, or an " interest in, the property insured.

" It is well settled that a partner has insurable in- " terest in the property of the firm.

" The transfer pleaded was by the plaintiff to a firm " of which he was one of the partners. So far as plain- " tiff is concerned, whatever interest he retained in the " goods never passed out of him. As the transfer is " stated in the answer, plaintiff passed the title of the " property from himself to another and himself. It is " true, that to a certain extent, a co-partnership is con- " sidered a person separate from the partners who may " have transactions, and make contracts with it as " such. But it is true that a partner, by the sale of " the property to the firm, actually parts with the in- " terest which, as a partner, he actually holds in the " firm property. The answer, therefore, fails to show " such an alienation as will defeat the policy and bar " the right of recovery by plaintiff."

There is no reason in view of the above cases, and of the reasonableness of the doctrine announced therein, why this Court should follow the decision of the court of New York in the case referred to by counsel for plaintiff in error, Germania Fire Ins. Co. *vs.* Home Ins. Co., 144 N. Y., 195. Moreover, the condition in this policy was much stricter and fuller than the one in the policy in suit. " Or if the property be sold or transfersed, or any change take place in the title or possession * * * this policy shall be void " (p. 197).

So also the condition in the second case cited by counsel for plaintiff in error, Drennen *vs.* London Assurance Corp., 20 F. R., 657, is much stricter than the condition of the present policy. "If the property insured be sold or "transferred, or any change takes place in the title, except "by succession, by reason of the death of the assured, "whether by legal or judicial process, or voluntary transfer "or conveyance, this policy shall be void."

The authority of these two cases is therefore not entitled to much weight in the decision of the present question.

The only case which counsel for defendant in error has been able to find construing a condition phrased in the words of the present one is the Scotch case of Peter Forbes & Co. *vs.* Border Counties Fire Office, Cases decided in the Court of Sessions, 3d series, vol. 11, p. 278. The policy of fire insurance involved in that case contained a condition exactly like condition 5 of the present policy except that for "due operation of law" in line 3 thereof (Rec., p. 34, fol. 54), the words "will or operation of law" are found. The state of facts in this case is rather an involved one, but the decision shows clearly that as long as the real party in interest retains a real interest in the property, the policy is not voided by any transfer to or from a firm of which the insured may formally or informally be a member. The following citation from the opinion of the Lord Justice gives the gist of the case:

> "It does not appear that the property which was in-"sured had passed to any other person than the original "insurer in the sense of that clause, and I shall very "shortly go over the facts and state the grounds on "which I arrive at that opinion."
>
> Peter Forbes & Co., a firm of manufacturing chemists consisting of Peter Forbes, Joseph Townsend and Readman, obtained in the name of the firm a policy of fire insurance on their works. Townsend was the

owner of the property but had signed a declaration of trust stating that the property was held by him as trustee for the firm. Then on July 15, 1871, the policy was taken out. The title to the subjects stood in the name of Mr. Townsend.

"Further it is proved that Mr. Townsend had advanced not merely the amount which he originally "undertook to advance, but that he was at the date of "this insurance, in advance to the extent of something "like £20,000. Mr. Readman had made a partial advance, "I think £500, and Mr. Forbes had put nothing into the "concern. Therefore at the time of the insurance I cannot doubt that Mr. Townsend had substantial interest "in the concern, and it does not occur to me that if a "fire had taken place at that time anyone would have "drawn the insurance money except Mr. Townsend. "His advances were not replaced; he was proprietor "of the subjects, holding them, no doubt, first, for the "company, but I rather think he would have been "entitled to hold the whole concern until these advances had been replaced. The fire took place in "December, 1871, and the defenders hold that they "are not bound to pay under their obligation because "there had been an agreement which in fact they "had nothing whatever to do with, and of which "they had no cognizance necessarily, by which there "was a new arrangement of the firm of Peter Forbes "& Co. If that had been fully carried out I should "not have thought that it made any difference upon "the question that we are now discussing, because my "opinion is that Mr. Townsend himself was substantially the insured. I have no idea that the mere "change of firm, or even the change of interest of the "partners in the firm, would bring that clause into "operation upon any construction of it. Certainly if "the firm had been dissolved altogether, so that it no "longer existed as an operative *persona*, the interests of "the partners in the concern would subsist, and they "would substantially be individually the insured, or "the firm subsisting at the winding up would be

" entitled to recover the amount insured. In the " present case, however, I should have doubted whether " the transfer was complete before the fire under any " circumstances. There is an agreement no doubt " added in November under which Mr. Forbes under- " takes to transfer and make over to the second party " the business carried on by the first party under the " firm of Peter Forbes & Co., and the whole assets and " good will thereof, and his right and interest therein. " He undertakes to do that, and in consideration of " the obligations undertaken by him, the second party " (that is to say, Mr. Townsend) has made payment to " the first party the sum of £400 sterling, and he under- " takes to relieve the first party of all the debts and " liabilities contracted by the first party under the " firm of Peter Forbes & Co. I rather think from what " we see that that still remains to be done. The obliga- " tions amount to over £20,000, and Mr. Townsend, " before he could have the benefit of this agreement, " or demand his transfer, must show that he is imple- " mented with part of the agreement, and clear the " business of the debts that were upon it. The matter " is not complete. The fire takes place in December " and before this has fully come into operation. No " doubt there was a " Gazette " notice that the firm " was dissolved, but the firm would still continue until " the conditions of this agreement had been fully im- " plemented. *Or putting that aside altogether*, and *sup- " posing that this had been an operative agreement from " the first, my opinion would still remain that Mr. Townsend " was substantially the insured, that he continues to have " the substantial interest in the policy; and that the prop- " erty which was therefore insured has not been in sub- " stance passed from the insured to any other party, and " that therefore the clause does not apply.*"

It is respectfully submitted, therefore, that the judge was correct in stating that there was no evidence before the jury to the effect that there was any alienation of the insured property.

Nor was the refusal of the judge to order the jury to return a separate verdict a reversible error. If the judge was correct in his ruling on the question of alienation, then no separate verdict was necessary. Moreover, the defendant did not request a charge for a separate verdict until after the jury had returned its verdict. (Rec., p. 84, fol. 113.) It was then too late to ask for a separate verdict. (Pacific Express Co. *vs.* Malin, 132 U. S., 531.) Moreover, "the fact that an action involves several different elements of recovery does not require a separate assessment of damages as to each." Encycl. Pleading & Practice, Vol. 22, page 912. Texas & P. Ry. Co. *vs.* Padgett, 36 S. W. Rep., 300.

It is respectfully submitted that the 9th and 17th assignments in error are not well founded.

## THIRD POINT.

**There was no error in the rulings of the Court with reference to the ground of defence that the policy was void for the reason that the fire occurred during an invasion, riot, etc.**

The facts as shown by the record and especially that part which is reprinted by plaintiff in error in his brief on pages 33 to 56, are as follows:

The fire occurred on the night of August 19 to 20, 1898. (Rec., p. 42, fol. 62.)

The defendant below offered evidence to show that there was a riot at Coto Laurel on August 19th to 20th. This evidence was contradicted flatly by the testimony of the plaintiff's witnesses Lopez and Montenegro. (Rec., pp. 71, 72.)

The language of the policy in so far as it relates to the question of invasion, riot, etc., reads as follows:

"This policy does not cover * * * loss or damage "by fire happening during the existence of any invasion,

" foreign enemy, rebellion, insurrection, riot, civil commo-
" tion, military or usurped power, or martial law within the
" country or locality in which the property is situated, unless
" proof be made to the satisfaction of the directors that such
" loss or damage was not occasioned by or connected with,
" but occurred from a cause or causes independent of the
" existence of such invasion, foreign enemy, rebellion, insur-
" rection, riot, civil commotion, military or usurped power,
" or martial law." (Policy, Rec., p. 33, fol. 53.)

The judge charged the jury, after referring to this provision, as follows:

" The defense mainly relied upon here is that this loss
" occurred during an invasion, riot, civil commotion, mili-
" tary or usurped power or martial law. A fair construction
" of that condition in the opinion of the Court is that that
" must, in order to excuse this company from liability in
" case of loss of property by fire, that that invasion by foreign
" enemy, rebellion, insurrection, riot, civil commotion, mili-
" tary or usurped power or martial law, must have been
" occurring within the section of the country where this loss
" occurred, or within the locality, and within such a radius
" of country where the loss occurred that danger arose to
" the property by reason of the existence of that rebellion,
" invasion, insurrection, civil commotion, military or
" usurped power, or martial law. And I further tell you,
" gentlemen, that if you believe from the evidence that this
" destruction of this property did not occur from any of these
" causes, and occurred from a cause independent of the ex-
" istence of any foreign enemy, rebellion, insurrection, riot,
" civil commotion, military or usurped power or martial law,
" then you should find so far as this defense is concerned
" for the plaintiff in damages whatever you think may have
" been his loss. This is a reasonable construction, as the
" Court thinks, of this and these conditions of the policy.
" * * * If you believe from the testimony that this
" loss occurred during invasion, rebellion, riot, civil com-
" motion, and other states of case as set out in the policy,
" existing in this locality where this store and real estate
" was located, or in that section of the country, and that

" it occurred by reason of the existence of that state of case,
" why, then, if you believe it did occur from that state of
" case in that section where the loss occurred, and by reason
" of it, you would find for the defendant."

Counsel for plaintiff in error, on page 61 of his brief, suggests that the defendant below might well have been entitled to a ruling upon the state of the proof, that a state of invasion existed at the place where the property was. This point was not raised in the court below, is not covered by an exception or an assignment in error, and cannot therefore be considered by this Court. It will not be discussed herein. (Young *vs.* Amy, 171 U. S., 179.)

The charge made by the Court was a perfectly proper one. The defendant, however, attempted to object to it for the reason that it did not properly state the law of the case in view of the language of the policy above quoted, which, according to the defendant below, was intended to cast the burden of proof that the fire was not caused by the riot upon the plaintiff. The plaintiff in error has placed an erroneous construction upon this section of the policy. The policy provides merely that loss by fire happening during the existence of any invasion, riot, etc., within the country or locality in which the property insured is situated shall not be paid by the company unless proof be made to the satisfaction of the directors that such loss or damage was not connected with this invasion or riot, but occurred from a cause or causes independent of the same. The construction of this provision should not offer much difficulty. In case a loss by fire occur during the existence of an invasion or riot, the Board of Directors *may call for proof* that such loss was not occasioned by the invasion, and if such proof be not furnished, or, if furnished, be not reasonably satisfactory, no action on the policy may be maintained. The condition was inserted merely for the protection of the

stockholders of the company, in that it placed a check upon the Board of Directors by providing that they should not pay certain claims without first calling for satisfactory proof that the loss was not due to certain casualties which were not insured against.

In Braunstein *vs.* Accidental Death Insurance Co., 1 Best & Smith, 783, the action was on a life insurance policy which contained the following condition:

> " Before payment of the sum insured by any policy " proof satisfactory to the directors should be furnished " of the death or deaths." * * *

Blackburn, J., concurring, said:

> " I quite admit that parties may make what they " please a condition precedent, but it must be shown " that they so intended. Here the stipulation is in the " language of one party, the company, and '*verba fortius accipiuntur contra proferentem*': no doubt they " might have stipulated that no money should be " payable under a policy unless the directors obtained " any evidence they chose to ask, but it would require " very distinct language, and much stronger than any " used here, to show that the parties so intended. " * * * But I think the plaintiff's counsel is right in " saying that that stipulation was only introduced with " reference to the duties of the directors towards the " company, *i. e.*, that the directors were not to settle a " claim against the company until they had got proper " evidence". (p. 799)

It is not denied that the directors of the company, through the local agent, might properly have stated to the insured that as the fire had occurred during a riot proof should be adduced by the insured to show that the riot was not responsible for the fire. But the directors not only did *not* call for such proof, and thereby waived their right under this con-

dition of the policy, but they wrote a letter to the insured, the substance of which was as follows:

" That as these events were produced by a riot, they were " not compelled to pay." (Rec., p. 42, fol. 62.)

As the company had already stated its conclusion that the fire was caused by the riot, there was nothing further for the insured to do but to bring an action and to force the company to prove the statement that the fire was caused by the riot.

An analogous question was involved in the case of Baillie & Co. *vs.* Assurance Co., 49 La. An., 658, in which the Court said, on page 661:

> " A stipulation for an appraisement should have for " its sole object the ascertainment of the amount of the " loss. The stipulation ceases to have force where the " insurer disputes to the insured the rights to recover " anything at all under the policy. We think the con- " clusion reasonable; in the presence of an absolute " refusal to pay anything, the assured should have the " right to file a suit and maintain an action for the " loss. That a denial of all accountability leaves " nothing to arbitrate. On the refusal of the defend- " ant to pay, and in the presence of defendant's neglect " actively to avail itself of the stipulation in regard to " the appraisal, the plaintiff might well infer that " nothing was left for him to do save to sue, and have " any right he had passed upon by the courts."

See also La Societe etc. *vs.* Wm. B. Morris & Co., 24 La. An., 347; Monteleone *vs.* Insurance Co., 47 La. An., 1563; National Union *vs.* Thomas, 10 App. D. C., 277.

German Ins. Co. *vs.* Frederick, 58 F. R., 144:

> " A denial of all liability by an insurance company " before the expiration of the time for making proof of " loss is a waiver of the condition requiring such " proof."

Such an action was then brought, and the company reiterated this statement in its fourth plea:

"4. For a fourth and further plea defendant says that "plaintiff ought not to have his said action because the "alleged loss or damage *was caused by fire*, happening dur- "ing the existence of an invasion, foreign enemy, rebellion, "insurrection, riot, civil commotion, military or usurped "power and martial law, within Porto Rico and in the "locality in which the property alleged to have been in- "sured was situated, and that no proof was made to the sat- "isfaction of the directors that such loss or damage as "alleged was not occasioned by or connected with, but "occurred from a cause or causes independent of the exist- "ence of such invasion, foreign enemy, rebellion, insur- "rection, riot, civil commotion, military or usurped power, "or martial law."

The letter of the company and its plea throw a great light upon the construction of this condition. Had the company construed the condition as it is construed by counsel for plaintiff in error in his brief, it would not have written that it rejected the claim because the fire had been caused by the riot, but it would have written that as the fire had occurred during a riot, the company did not feel compelled to pay unless the insured produced the proper proofs.

It is ridiculous to assert in view of these facts that the policy intended to cast the burden of proof, that the fire was not caused by the riot, upon the insured in an action at law. The company drew the contract and must be supposed to have been more familiar with its provisions than the insured. The construction which was placed on the contract by the company, as is shown by this letter, is therefore controlling in this case. Should there be any doubt as to the meaning of the condition it must be resolved against the company and in favor of the insured. Certainly the company may

not in this Court juggle away the evident meaning and intent of the condition and make it mean something that it never said, namely, that the burden of proof in an action at law should be upon the insured to show that the fire had not been caused by the riot.

"It is the duty of the insured to clothe the contract in language so plain and clear that the insured cannot be mistaken or misled as to the burdens or duties thereby imposed upon him. Having the power to impose conditions, and being the party who draws the contract, he must see to it that the conditions are plain, easily understood, and free from ambiguity. * * * Failing to employ a clear and distinct form of expression, the benefit of all doubts will be resolved in favor of the assured. The courts will not permit the assured to be misled, or cheated, where there is any sort of justification, from the language used, for the interpretation placed by him upon the instrument. A contract drawn by one party, who makes his own terms, and imposes his own conditions, will not be tolerated as a snare to the unwary, and if the words employed, of themselves, or in connection with other language used in the instrument, or any rights to the subject-matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the assured." Wood on Fire Insurance, Vol. I, page 161, Second Edition, citing Hoffman *vs.* Ætna Insurance Co., 32 N. Y., 405; Reynolds *vs.* Commerce Ins. Co., 47 N. Y., 597, and many other cases.

In Insurance Company *vs.* Eggleston, 96 U. S., 572, 577, Mr. Justice Bradley, speaking for the Court, said:

"We have recently, in the case of Insurance Co. *vs.* Norton, 96 U. S., 234, shown that forfeitures are not favored by the law, and that courts are always prompt to seize hold of any circumstances that indicate an elec-

" tion to waive a forfeiture or any agreement to do so " on which the party has relied and acted. Any agree- " ment, declaration or course of action, on the part of " the insurance company, which leads the party insured " honestly to believe that by conforming thereto a for- " feiture of his policy will not be incurred, followed by " due conformity on his part, will and ought to estop the " company from insisting upon the forfeiture, though it " might be claimed under the express letter of the con- " tract. The company is thereby estopped from en- " forcing the forfeiture." Cited in Hartford Life Ins. Co. *vs.* Unsell, 144 U. S., 439, 449.

It is not understood that counsel for plaintiff in error in his brief intends to urge that the Judge was mistaken in limiting the jury to the consideration of the testimony of invasion at or near the place of the fire and at the time of the fire.

Assuming, merely for the sake of argument, that the construction placed upon the condition by the counsel for the plaintiff in error is the correct one, and that the Court should have instructed the jury that if it found that there was an invasion or riot in the locality in which the fire occurred it must find for the defendant because the policy places upon the plaintiff the burden of proving that the fire was not caused by said riot or invasion, it is respectfully submitted that this point was not properly raised at the trial and cannot be made use of by the defendant on appeal.

It is a well-known principle of the law relating to the conduct of trials, that the "attention of the judge should be called to the objectionable charge in order that he may have an opportunity to make proper corrections. Exceptions to instructions should specifically point out the alleged error. A party excepting must make his exception so specific that the matter relied on as error will be apparent

to his adversary and to the primary court (Ayrault *vs.* Pacific Bank, 47 N. Y., 576), for his adversary having his attention directed to the special matter relied on as erroneous, has the right and privilege of waiving such matter, rather than by insisting on it, incur the hazard and delay of an appeal to a superior tribunal. The Court, having its attention specially directed to the erroneous matter, might be satisfied of the error into which it had fallen through inadvertence, and could voluntarily correct it, by a reversal of its rulings, and thus protect the party excepting from all injury." (Encycl. Pleading and Practice, Vol. 8, page 262, Tit. Exceptions and Objections.)

It will be seen by an inspection of pages 82 and 83 of the record that the objection to the charge now urged in this Court was never made plain to the Judge below. At the beginning of folio 110 the attorney for the defendant excepted to the portion of the charge which limited the consideration of invasion and riot to the section of the country or the locality where the fire occurred. The Judge overruled this exception (Rec., p. 83, top), and properly so, as a riot in other parts of the island could have had no bearing upon the fire in Coto Laurel. Thereupon the following occurred:

" Mr. Dexter: Defendant also wishes to except to that " part of the charge of the Court to the effect that 'if you " ' believe that the loss did not occur from these causes.' " The objection being that defendant asks that the charge " instruct the jury that they shall find for the defendant if " they find that the loss occurred during the existence of " any of these conditions—

" The Court: This cause or any of them.

" Mr. Dexter: Defendant asks that the charge be modi- " fied to this effect: 'If you believe that the loss occurred " ' during the existence of invasion, foreign enemy, rebellion, " insurrection, riot, civil commotion, military or usurped

" power or martial law, then you will find for the defendant.'
" In other words, not making that the cause, but if it is
" shown that those circumstances existed that then—
" The Court: The objection you make is, if that is modi-
" fied as you wish—but it does not fix any locality or sec-
" tion of the country.
" Mr. Dexter: Your Honor has already passed on that
" in this prior objection, but I refer now to the other feature
" as to whether the fire should prove to be the result of any
" of these conditions mentioned which would be the cause.
" We object to making—
" The Court: I have told the jury that if the fire arose
" by reason of any of these causes existing in that section or
" locality of the country.
" Mr. Dexter: That is the part defendant excepts to.
" The Court: You may take an exception to that. I un-
" derstand you are claiming, for instance, if the Germans
" had invaded San Juan and got into San Juan, and if this
" property in this place had been destroyed by a boy drop-
" ping a match, that the company would be released. The
" Court has not that view.
" Mr. Dexter: We also except to that part of the charge
" as to the proof of the loss.
" The Court: Well, save an exception."

This citation from the record shows that the defendant desired to raise the question that the charge was incorrect in so far as it did not instruct the jury to find for the defendant in case it found the fact of invasion or riot. However, he never made this point clear to the Court. The Court had its mind upon the limitation of the competent proof of invasion to the locality or section of the country in which the fire occurred, but the attorney for defendant *by refusing to limit his request for charge to such locality* not only did not give the Court the opportunity of taking its mind off the point of locality of the fire and putting it on the point which defendant's attorney tried to raise, but actually requested improper instructions. "The request should specifically

call to the attention of the Court the point sought to be made, in order to render its refusal available on appeal." (Encycl. Pleading & Practice, Vol. 8, page 271.) This Court in Beaver *vs.* Taylor, 93 U. S., 46, 55, has said: "One object of an exception is to call the attention of the "circuit judge to the precise point as to which it is supposed "he has erred, that he may then and there consider it and "give new and different instructions to the jury, if in his "judgment it should be proper to do so."

Instead of doing this, the defendant asked that the charge be modified to this effect: "If you believe that the loss "occurred during the existence of an invasion, foreign "enemy, rebellion, insurrection, riot, civil commotion, mili- "tary or usurped power or martial law, then you will find "for the defendant."

The Court objected to this modification as it did not fix any locality or section of the country, but defendant's attorney did not make the necessary correction, thus misleading the Court to such a degree that the Court never understood his point, but did understand that he was claiming, "For "instance, if the Germans had invaded San Juan and had "got into San Juan, and if this property in this place had "been destroyed by a boy dropping a match, that the com- "pany would be released."

In other words, the Court never saw the point which defendant intended to raise by his exception. This was certainly not the fault of the Court because the defendant had requested that for the alleged improper charge a modified charge be substituted, which modified charge, however, would have been incorrect because it was not limited to the locality or section of the country where the loss occurred.

"Where a party relies upon a general exception for "refusing to charge, the request must be perfectly

" proper as an entirety ; if it embraces any idea which " ought not to be presented, it destroys the exception " although one part of the proposition if presented " separately might be proper." Encycl. Pleading & " Practice, Vol. 8, page 271.

" When the requested instructions would have been " correct with the addition of a single qualifying word, " the omission of that word in the request was held fatal " to the exceptions."

Marshall *vs.* Oaks, 70 Md., 308, 312, citing Stowe *vs.* Heywood, 7 Allan, 118.

By requesting the Court to make an improper charge in place of a charge alleged by the defendant to be improper, the defendant lost his right to profit by this alleged error of the Court. Certainly it is not fair to the defendant in error that he should be compelled to submit to another wearisome trial merely because the defendant was not willing to limit his request to a charge which was proper in other respects, although reminded by the Court of the defect in his proposed charge. He might just as well have added another request for a charge similar to the one which he did make, but in which the locality of the invasion was limited as the Court thought it should be limited.

It is not shown in the brief of plaintiff in error how the statement of the judge referred to in the 16th assignment of error was calculated to injure the defendant, nor is it understood how this could have been possible; moreover the statement was not excepted to at the trial, and cannot therefore be considered here. (Stanton *vs.* Embry, 93 U. S., 548.) At any rate, the statement of the judge was a proper one as it was a mere *reductio ad absurdum* of defendant's argument.

It is submitted that the 14th, 15th, and 16th assignments in error are not well founded.

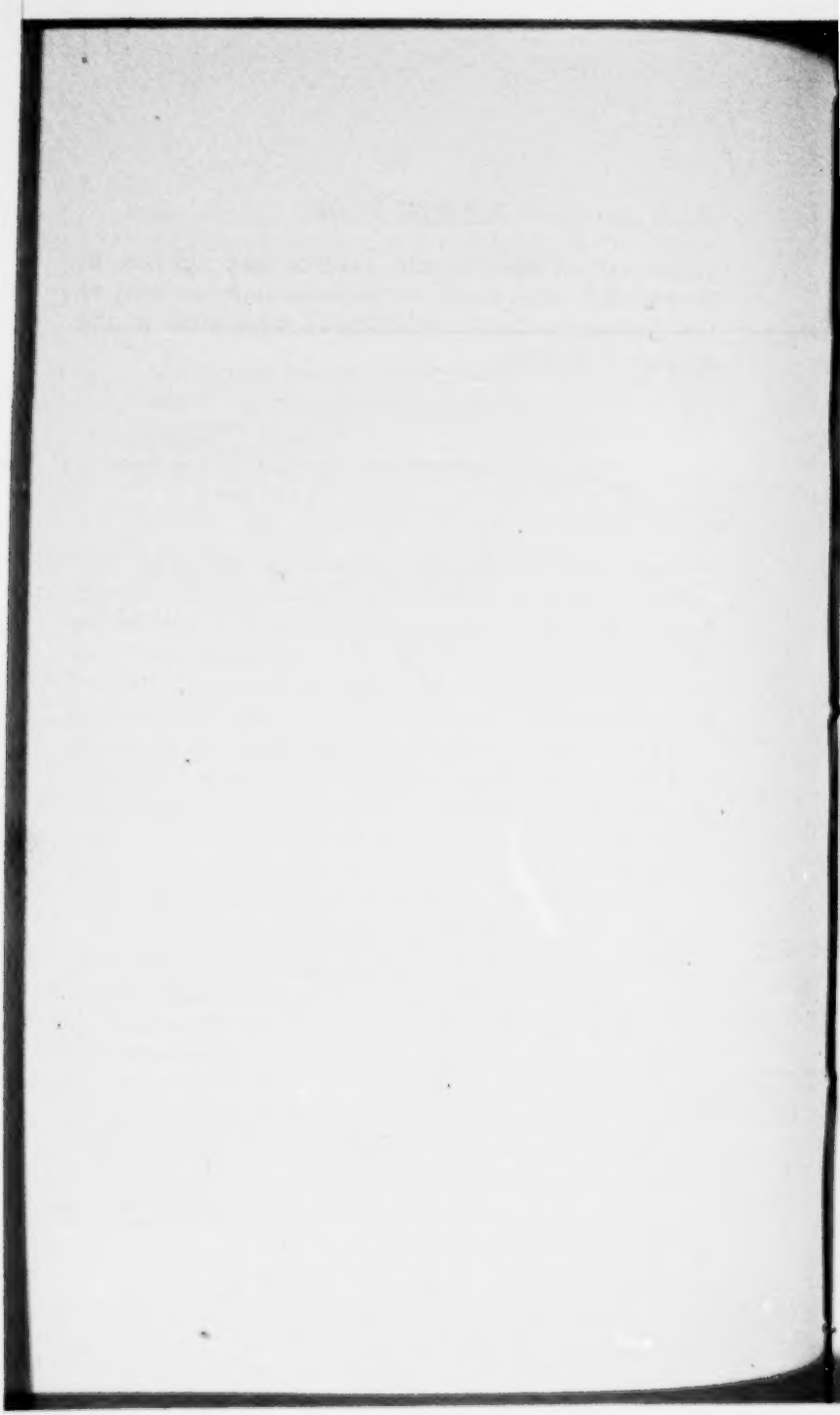
## FOURTH POINT.

**The writ of error should be dismissed for lack of jurisdiction with costs to the defendant in error, or the judgment should be affirmed with costs to the defendant in error.**

Respectfully submitted,

FRITZ V. BRIESEN,

*Of Counsel for Defendant in Error.*



# Supreme Court of the United States.

No. 86.—October Term, 1903.

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|---|---|
| The Royal Insurance Company, Plaintiff in Error, vs. Ruperto Martin, as Executor of the Will of Francisco Martin, Deceased. | In error to the District Court of the United States for the District of Porto Rico. |

[January 11th 1904.]

Mr. Justice Harlan delivered the opinion of the Court.

This was an action by the executor of the insured on a policy of insurance made by the Royal Insurance Company, a British corporation, whereby that company insured Francisco Martin against loss or damage by fire to the amount of seven hundred pounds on a certain building at Coto Laurel, District of Ponce, Porto Rico, and for nine hundred pounds on the stock in trade contained in such building.

The declaration alleged and the fact was not disputed that during the term of the policy all the property insured was destroyed by fire. The case was tried by the court and a jury and a verdict was returned in favor of the plaintiff for $7,623, the court refusing to require the jury to find the damages, separately, as to the building and the stock of goods; and for the above amount judgment was rendered against the company.

The defendant in error disputes the jurisdiction of this court to review the judgment below. If this position be well taken, the writ of error should be dismissed without considering the merits of the case. *Continental Nat. Bank* v. *Buford*, 191 *U. S.* 119. We must therefore examine the question of the jurisdiction, which depends upon the scope and effect of various statutory provisions, including those relating to the court established by Congress in Porto Rico. We will look at the statutes according to the respective dates of their enactment.

By section 702 of the Revised Statutes of the United States it is provided that "the final judgments and decrees of the Supreme Court of any Territory, except the Territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, &c., exceeds $1,000, may be reviewed and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a Circuit Court.

In the Territory of Washington the value of the matter in dispute must exceed $2,000, exclusive of costs. And any final judgment or decree of the Supreme Court of said Territory in any cause [when] the Constitution or a statute or treaty of the United States is brought in question may be reviewed in like manner."

This provision was modified by the act of March 3d 1885, entitled "An act regulating appeals from the Supreme Court of the District of Columbia and the Supreme Courts of the several Territories;" for by the latter act it was provided: "§ 1. That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of $5,000. § 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute." 23 *Stat.* 443, *c.* 355.

Then came the act of March 3d 1891, "to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes." 26 *Stat.* 826. The 5th section of that act prescribes the cases that may be brought directly to this court from the District Courts or from the existing Circuit Courts of the United States, while the 6th section provides that the Circuit Courts of Appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law"—the judgments or decrees of the Circuits Courts of Appeals to be final "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases." Further, by the same section: "In all cases not hereinbefore, in this [6th] section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States when the matter in controversy shall exceed $1,000, besides costs." § 6. The 13th section of the act provides: "Appeals and writs of error may be taken and prosecuted from the decisions of the United States Court in the Indian Territory to the Supreme Court of the United States, or to the Circuit Court of Appeals in the Eighth Circuit, in the same manner and under the same regulations as from the Circuit or District Courts of the United States, under this act." And the 15th section

is in these words: "That the Circuit Court of Appeal *in cases* in which the judgments of the Circuit Courts of Appeal are made *final* by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders and decrees of the Supreme Courts of the several Territories as by this act they may have to review the judgments, orders and decrees of the District Court and Circuit Courts; and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits." 26 *Stat.* 826.

This brings us to the act of April 12th 1900, *c.* 191, entitled, "An act temporarily to provide revenues and civil government for Porto Rico and for other purposes." 31 *Stat.* 85, *c.* 191.

By section 33 of that act it is declared, among other things, that the judicial power shall be vested in the courts and tribunals of Porto Rico as then established and in operation, under and by virtue of certain General Orders promulgated by military authority—the Chief Justice and Associate Justices of the Supreme Court of Porto Rico and the Marshal thereof to be appointed by the President, by and with the advice and consent of the Senate, and the judges of the district courts by the Governor, by and with the advice and consent of the executive council.

By the 34th section of that act Porto Rico was constituted a judicial district to be called the District of Porto Rico with a district judge, a district attorney and marshal to be appointed by the President, by and with the advice and consent of the Senate, and with a district court called the "District Court of the United States for Porto Rico," which court, in addition to the ordinary jurisdiction of District Courts of the United States, shall have jurisdiction of all cases cognizant in the Circuit Courts of the United States.

The section of the Porto Rico act upon which the question of our jurisdiction mainly depends is the 35th, which is in these words: "That writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken *to the Supreme Court of the United States* in the same manner and under the same regulations and *in the same cases* as from the supreme courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied; and the supreme and district courts of Porto Rico and the respective judges thereof may grant writs of *habeas corpus* in all cases in which the same are grantable by the judges of the district and circuit courts of the United States. All such proceedings in the Supreme Court of the United States shall be conducted in the English language." 31 *Stat.* 85, *c.* 191.

It thus appears that writs of error and appeals may be prosecuted directly to this court from the District Court of the United States for Porto Rico, in the same manner, under the same regulations, and "in the same cases" as from the Supreme Courts of the Territories of the United States.

Could a case like the one before us have been brought directly to this court from the Supreme Court of one of the Territories of the United States? If so, our jurisdiction in this case cannot be disputed under the Porto Rico act.

The question just stated must be answered in the affirmative, if we look alone at section 702 of the Revised Statutes, and the act of March 3d 1885, c. 355; for, it is clear from the express words of those enactments that this court may review the final judgment of the Supreme Court of one of the Territories of the United States in any case, without regard to the sum or value in dispute, where the Constitution or a statute or treaty is brought in question, and in every other case whatever where the sum or value in dispute exceeds $5,000, exclusive of costs.

Is this result, so far as the final judgments of the District Court of the United States for Porto Rico are concerned, affected by anything in the Circuit Court of Appeals act of 1891? We think not. That act, no doubt, contemplated a review by the appropriate Circuit Court of Appeals, first, of the final judgments of the United States Court in the Indian Territory in all cases covered by section 702 of the Revised Statutes and the act of March 3d 1891; second, of the final judgments of the Supreme Courts of the other Territories of the United States in cases the judgments in which, by that act (§ 6), are made final. No provision is found in the act of 1891 for the review in a Circuit Court of Appeals of the judgment of the Supreme Court of a Territory of the United States in a case of the class the judgment in which, if rendered in a Circuit Court of Appeals, is not final. So that the jurisdiction of this court to review the judgments of the Supreme Courts of the several Territories in that class of cases was the same after as before the passage of that act. *Shute* v. *Keyser*, 149 *U. S.* 649, 657. Clearly this case is not of the class the judgment in which, if rendered in the Supreme Court of a Territory of the United States, to use the words of the act of 1891, is reviewable in a Circuit Court of Appeals under that act. It is not a patent, revenue or criminal case, nor one in which the jurisdiction of the court below depended entirely upon the opposite parties to the controversy being aliens and citizens of the United States or citizens of different States. But it is one which, if it had been determined by the Supreme Court of one of such Territories of the United States, could have been brought here directly, upon writ of error, after as well as before the passage of the act of 1891. Our conclusion must, therefore, be that the jurisdiction of this court cannot be denied by reason of any provision in the act of 1891.

This view is strengthened by what we deem the better construction of the Porto Rico act of 1900. That act does not refer to the Circuit Court of Appeal act of 1891, nor contain any provision looking to the assignment of Porto Rico to one of the established Circuits. This tends to show that it was the intention of the act of 1900 to establish a direct connection between this court and the United States Court for Porto Rico in respect of every case which, if determined by the Supreme Court of a Territory of the United States, could have been brought here under the statutes in force when the act of 1891 was passed. In our opinion, Congress did not intend that any connection should exist between the United States Court for Porto Rico and any Circuit Court of Appeals established under the act of 1891.

These views as to the scope and effect of the Porto Rico act of 1900 is not at all affected by the provisions in the acts relating to the re-examination of the final judgments of the highest courts of the Indian Territory, Hawaii and Alaska. *Indian Territory*, 26 *Stat.* 830, *c.* 517, §13; *Hawaii*, 31 *Stat.* 141, 158, *c.* 339, §86; *Alaska*, 31 *Stat.* 321, 345, *c.* 786. Those acts had exclusive reference to the particular Territories named—each, upon its face, showing that the final judgments of the courts of those Territories, at least in certain cases, should be reviewable, primarily, in a designated Circuit Court of Appeals of the United States. No such provisions are found in the act of 1900, and this court has not assumed to assign Porto Rico to any Circuit of the United States. The Territories of the United States, referred to in the 15th section of the act of 1891, are, in our opinion, those which it was contemplated would be assigned to some Circuit, and they do not embrace Porto Rico; and the words in the act of 1900, "in the same manner and under the same regulations and in the same cases as from the Supreme Court of a Territory of the United States," refer not to the act of 1891 but to those general statutes authorizing this court to review the final judgment of the Supreme Court of a Territory of the United States in every case, without regard to the sum or value in dispute, where the Constitution of the United States or a treaty thereof or an act of Congress is brought in question and the right claimed thereunder is denied, and in every other case where the sum or value in dispute exceeds $5,000, exclusive of costs. If Congress had intended that the judgments of the United States Court for Porto Rico should, in any class of cases, be re-examined in some Circuit Court of Appeals of the United States, it would have so declared by appropriate words. It did not so declare.

For the reasons stated, we hold that our jurisdiction to re-examine it cannot be questioned.

We come now to the merits of the case; our attention being first directed to the questions arising under that clause of the policy providing that it shall not cover "loss or damage by fire happening during the existence of any invasion, foreign enemy, rebellion, insurrection, riot, civil commo-

tion, military or usurped power, or martial law within the country or locality in which the property insured is situated, unless proof be made to the satisfaction of the directors that such loss or damage was not occasioned by or connected with, but occurred from a cause or causes independent of the existence of such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law."

As the words of the policy are those of the company, they should be taken most strongly against it, and the interpretation should be adopted which is most favorably to the insured, if such interpretation be not inconsistent with the words used. *National Bank* v. *Insurance Company*, 95 *U. S.* 673, 678–9; *Liverpool &c. Ins. Co.* v. *Kearney*, 180 *U. S.* 132, 136; *Texas & Pacific Railway Co.* v. *Reis*, 183 *U. S.* 621, 626. In this view the above words should be held to mean that the policy covered loss by fire occurring during the existence of (if not occasioned by nor was connected with) any invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law, in the general locality where the property insured was situated. If the loss so occurred then the company was entitled to demand, before being sued, that proofs be furnished showing that the loss was not occasioned by or connected with, but was from causes independent of, such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law. But the company made no demand for proofs on this point. On the contrary, the formal production of such proofs was, in effect, waived; for the company assumed that what occurred in the locality, at the time of the fire, constituted a riot, which relieved it from all liability. It, therefore, gave notice by its agents that as the fire and the destruction of the goods "were produced by a riot they were not compelled to pay," and that "the policy would not be paid." A general, absolute refusal to pay in any event, or a denial by the company of all liability under its policy, dispensed with such formal proofs as a condition of its liability to be sued, and opened the way for a suit by the assured in order that the rights of the parties could be determined by the courts according to the facts as disclosed by evidence. It was so held by this court in a case of fire insurance, *Tayloe* v. *Fire Insurance Company*, 9 *How.* 390, 403; and the same principle was recognized as applicable in a case of life insurance. *Knickerbocker Life Insurance Co.* v. *Pendleton*, 112 *U. S.* 696, 709. To the same effect are authorities cited by text-writers. 2 *May on Insurance*, 3*d edit.* § 469; 2 *Biddle on Insurance*, § 1139; 2 *Wood on Fire Insurance*, 2*d ed.* § 445. Now, whether there was any substanial connection between the fire and military or other disturbance of the kind specified, existing in the locality where the property

was situated, was a question of fact, and it was properly left to the jury. The court, referring to the above clause of the policy, charged the jury: "A fair construction of that condition, in the opinion of the court, is that in order to excuse this company from liability in case of loss of property by fire, that invasion by foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law, must have been occurring within the section of the country where this loss occurred, or within the locality and within such radius of country where the loss occurred, that damage arose to property by reason of the existence of that rebellion, invasion, insurrection, civil commotion, military or usurped power, or martial law. And I further tell you, gentlemen, that if you believe from the evidence that this destruction of property did not occur from any of these causes, and occurred from a cause independent of the existence of any foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law, then you should find, so far as this defense was concerned, for the plaintiff in damages whatever you think may have been his loss."

While there is some little confusion in this part of the record, we think that the trial court did not misconstrue the policy, nor commit any error upon this particular point of which the plaintiff was entitled to complain. It is to be taken that the jury found, upon the whole evidence, that the loss was occasioned by causes independent of the existence of any invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law. The facts under this issue having been fairly submitted to the jury, its finding cannot be disturbed.

An important question remains to be considered. It arises out of the interest which the assured had in the property at the time of the fire. The evidence showed that the original policy was issued to Francisco Martin on the 12th day of March 1877, he being at that time the sole owner of the building and of the goods contained in it. The policy was renewed from year to year, the last one being dated March 12th 1898, and extending until March 12th 1899. The fire occurred in August 1898, the assured being then alive. He did not die until October 1899. Now, at the time of the fire, the goods insured had, by act of the assured, become, *in their entirety*, the property of Martin Brothers, a firm or society composed of two sons of the assured as active partners, and of himself as silent partner. The father turned over the business to the control and management of the two sons, and to them surrendered the custody of the goods constituting the stock in trade. At what date the sons acquired their interests in the goods and in the business does not distinctly appear. But it was before the fire; and of the change whereby the father ceased to be the sole owner of the goods described in

the renewal policy and whereby also they became the property of the firm of Martin Brothers, no notice whatever was given to the company prior to the fire.

The question is whether such change in the ownership of the goods insured—no change occurring in the ownership of the building—discharged the company from all liability on the policy under that clause providing that the policy should cease "to be in force as to any property hereby insured which shall pass from the insured to any *other person otherwise* than by due operation of law, unless notice thereof be given to the company, and the subsistence of the insurance in favor of such other person be declared by a memorandum endorsed hereon by or on behalf of the company."

Upon the question whether an insurance policy, of the general class to which the one in suit belongs, continues in force after a sale or transfer by the assured of his interest in the property insured, the adjudged cases are by no means in accord, and it will serve no useful purpose to make an extended review of them and show wherein they differ. It will be found upon examination that each policy contained language peculiar to itself, and upon that language the particular case turned. Of course, in every case, the fundamental inquiry must be as to the intention of the parties, to be gathered from the words of the policy; always, however, interpreting the policy most favorably for the insured, where it is reasonably susceptible of two constructions.

On the face of the policy in suit it appears that the buildings and the goods contained in them were insured separately, seven hundred pounds on the building and nine hundred pounds on the stock in trade. One construction of the policy is that if either the building *or* the stock in trade should pass from the assured to another person, then the policy should cease as to *all* the property insured. But another construction, the one most favorable to the assured, which is not unreasonable, and which is not forbidden by the words used, is that as the building and the stock in trade were separately insured the policy should cease to be in force only as to the particular property insured that passed from the assured without notice to the company. The latter is the better construction, and we hold that it is to be considered as if the building was covered by one policy and the goods by another. Whatever may have been the extent of the interest acquired by the firm of Martin Bros. in the goods, no interest in the building passed to them. The building remained, in its entirety, the sole property of the assured, up to the time of the fire, and the policy may reasonably be and therefore ought to be so construed as not to preclude a recovery in respect of its destruction by fire.

But in respect of the goods in question, the case depends upon other considerations. When the goods were insured they were in their entirety

the sole property of Francisco Martin, the assured. He was the legal owner of the whole of them. They were in his custody, and subject to his exclusive control. But at the time of their destruction by fire the ownership of the goods, in their entirety, had, by transfer from the assured, passed to Martin Brothers, and became, without notice to the company, subject to the exclusive control, in their entirety, of that firm. Such a change of ownership and control, it must be held, avoided the policy, *unless* it was kept alive by the mere fact that the assured although taking no active part in the business of the firm was yet a silent partner, and as such had some interest in the insured property. But that fact cannot be given the weight suggested without ignoring altogether the reasons which, it must be assumed, induced the company to incorporate into its policy the provision that if any property insured passed from the assured to another person without notice to the company, the policy should cease to be in force. It may well be that an insurance company would be willing to insure property owned by a particular person of whose character and habits its agent had knowledge or information, but unwilling to insure the same property if owned by that person in connection with others. Prudence requires that a company, before insuring against fire, should be informed as to the actual ownership of the property proposed to be insured, and know who, in virtue of such ownership, will be entitled to its custody and to control it during the term of the policy. The provision that the policy in this case should cease to be in force from the moment the insured property passed from the assured to others without notice to the company implied not only that the company relied upon the integrity and watchfulness of the assured, but that if he looked to the company for indemnity against loss by fire he must take care not to allow the property to "pass" from him to others, without notice to the insurer. The assured, without notice to the company, did pass the goods in question to a firm, each member of which thereby acquired an interest *in the whole of the goods* transferred. The ownership of the firm was in law and in fact distinct from the original sole ownership of the assured. Practically, for all purposes of guarding the goods insured against destruction by fire, they passed to the active partners who were strangers to the property at the date of the policy—the assured, as a silent partner, retaining no interest in any particular part of the goods, and being under no obligation as between himself and the active partners, to care for the safety of the property. Its safety, after the transfer, depended altogether upon the watchfulness of the active partners in whose possession the goods were up to the fire. It only remained for the original sole owner, after passing the goods in their entirety to the firm of Martin Brothers, in which he was a silent partner, to receive such profits as accrued to him from their use in the business as conducted by the active partners.

We are of opinion that the case was not tried in accordance with a sound construction of the terms of the policy relating to the goods insured. The court proceeded upon the ground that there was no evidence of such alienation or change of ownership as avoided the policy in respect of the goods. In this error was committed, and a new trial must be had in conformity with the views we have herein expressed.

The judgment of the court below is reversed, and the cause is remanded with directions to set aside the judgment and grant a new trial.

*Reversed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*